80-887

No. _____

Supreme Court, U. S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM F. BURNS AND THE RECTOR, WARDENS AND VESTRYMEN OF ST. MARK'S CHURCH IN ORANGE, NEW JERSEY,

Petitioners,

vs.

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, AND THE RIGHT REVEREND GEORGE E. RATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the reliance by the courts below on sharply disputed expert testimony as to interpretations of prayers,* rituals, rubrics of the church prayer book and the construction of non-property church canons to determine which unit of church government has the ultimate power of control over the property of a local church involve the courts in "a searching and therefore impermissible inquiry into church polity" in violation of the First Amendment and the limitations set down by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), and *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)?

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* Illustrative of the evidence considered relevant to the issue of control over local parish property is the following prayer, which was admitted into evidence, over objection, and interpreted by respondents' expert at trial:

> Vouchsafe O Lord, to be present with us, who are here gathered together with all humility and readiness of heart, to consecrate this place to the honour of thy great Name; separating it henceforth from all unhallowed, ordinary, and common uses; and dedicating it to thy service, for reading thy holy Word, for celebrating thy holy Sacraments, for offering to thy Majesty the sacrifices of prayer and thanksgiving, for blessing thy people in thy Name and for the performance of all other holy offices: accept, O Lord, this service at our hands, and bless it with such success as may tend most to thy glory, and the furtherance of our happiness, both temporal and spiritual; through Jesus Christ our blessed Lord and Saviour. (6T38-39; Da686).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

William F. Burns and The Rector, Wardens and Vestrymen of St. Mark's Church in Orange, New Jersey,*

Petitioners,

vs.

The Diocese of Newark, The Trustees of The Episcopal Fund and Diocesan Properties of the Diocese of Newark, and The Right Reverend George E. Rath,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

William F. Burns *et al.* respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey entered in this matter.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of New Jersey in this case (Appendix A) and in its companion case *The Protestant Episcopal Church in the Diocese of New Jersey v. Graves, petition for cert. filed*

* The following persons were joined as individual defendants: William L. Wilkenson, Nicholas Bowness, William Clark, Ward Elliott, Sr., Robert A. Wacker, Lawrence Grimm, George Streisguth, William Wilkenson, Jr., Mathilde L. Yeomans, Paul Clarke, George Sengelaub, Martha Tant and Floyd Tomkins.

sub nom. Moore v. The Protestant Episcopal Church in the Diocese of New Jersey (October 21, 1980) (No. 80-675) (hereinafter referred to as "*Diocese of New Jersey*") are reported at 83 N.J. 594, 417 A.2d 31 (1980) and 83 N.J. 572, 417 A.2d 19 (1980), respectively. The opinion of the Superior Court of New Jersey, Chancery Division, is not reported (Appendix B). The opinions in *Diocese of New Jersey* are reproduced as Appendices A and B to the Petition for Writ of Certiorari in such case and references to such opinions in this Petition will be to such Appendices.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 24, 1980. The Order of the Supreme Court of New Jersey denying a timely petition for rehearing was entered on September 16, 1980 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

United States Constitution, Amendment XIV, Sec. 1:

> [n]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case presents the question whether the determination by the courts below that the Episcopal Church is hierarchical for property purposes, *i.e.*, that it has an "ultimate power of control more or less complete" (*Watson v. Jones*, 80 U.S. 679, 722 (1872)) over the property of local parishes, was the result of an impermissible delving by the civil courts into the polity and religious doctrines of the church organization.

The case arises in the context of a dispute over the ownership and control of property of a local church corporation which had been affiliated with a general church for many years prior to voting unanimously to sever its relationship with that general church. The record discloses what the dissenters below described as "sharp disagreement" among expert witnesses and the absence of any explicit provisions in the organic documents of either the general church or the local parish dealing with the issue of property control. Nevertheless, by making doctrinal decisions based upon interpretations of various provisions of church canons, rubrics of The Book of Common Prayer and customs and ceremonies of the Church, the courts below found there to be hierarchical control over property. The courts even considered, over objection, lengthy quotations of prayers and testimony as to the implications of these prayers with respect to the issue of property control.

How Federal Question Was Presented

Petitioners raised the issue of the impermissibility of delving into the polity and religious doctrines of the general church throughout all stages of this case. The argument was first made in petitioners' brief in opposition to

respondents' application for a preliminary injunction. At trial, petitioners objected to the admission of evidence dealing with prayers and other ecclesiastical and ritual matters, and specifically moved to dismiss at the end of respondents' case on the ground that respondents' own witnesses had conceded that the hierarchical nature of the Episcopal Church could only be determined on the basis of an extensive inquiry into doctrinal questions (2T127).[1] The issue was similarly pressed on the appeal to the Supreme Court of New Jersey.

Facts

The undisputed facts show that from its incorporation in 1827 as a New Jersey religious society, until its vestry (board of trustees) and members voted to disaffiliate in 1977, St. Mark's Church had been associated with the Episcopal Church in New Jersey.

During the period of this association, St. Mark's contributed funds to the general church and participated in general church activities, but at no time received financial support of any nature from the general church (Da298). All real property acquired by St. Mark's over the years was acquired free from any trust or any restriction in favor of the general church organization. With only one small exception involving $3,789, the personal property, trust and endowment funds of St. Mark's were also free of any trusts or reversions in favor of the general church (Da517).

Throughout its history, St. Mark's functioned as an independent church organization with respect to its business affairs. Its parish vestry made all decisions with

1. The seven volumes of trial transcript are referred to herein as 1T through 7T. The references to Da are to the four-volume appendix submitted by petitioners to the Supreme Court of New Jersey.

respect to the purchase or sale of property, contractual commitments, salaries paid to personnel, construction and renovation of church buildings and the general conduct of its financial activities (2T21-24; Da301-302; Da667-677). While St. Mark's often paid its diocesan assessments, the record discloses at least fourteen different occasions upon which St. Mark's refused to pay such levies, choosing to satisfy the financial obligations of the parish in preference to its obligations to the Diocese.

In June and July of 1977, the vestry and membership of St. Mark's voted overwhelmingly to terminate the affiliation of St. Mark's with the Episcopal Church (Da518; Da524). This decision was unanimously reaffirmed by both the vestry and the membership in September and October of the same year (5T10-14; Da526; Da529). Thereafter, St. Mark's became affiliated with The Anglican Catholic Church (formerly The Anglican Church in North America), a newly-formed national church organization composed in the main of more than 150 congregations which had also disaffiliated from the Episcopal Church.

The respondent Diocese refused to return to St. Mark's the funds which the Diocese through its Trustees of The Episcopal Fund and Diocesan Properties (the "Fund") was holding for the benefit of the parish. The Diocese then instituted suit seeking a determination by the civil courts that the properties of St. Mark's were held in trust for the benefit of the Diocese and through it for the use and benefit of the general church (Da13). The petitioners filed an answer and counterclaim denying the existence of any trust in favor of the Diocese or the general church and seeking the return of the more than $200,000 in investments held in the Fund and the quieting of title to the parish real estate (Da25-26).

Agreeing with petitioners' claim that there was a factual question whether the general church was hierarchical for property purposes, the trial court denied the respondents' motion for summary judgment and permitted the case to go to trial. A six-day trial was held in February and March of 1979. The basic facts surrounding the history of St. Mark's and its disaffiliation were not disputed; rather the focus of the trial was on the nature of the polity of the general church. Each party called experts in church history and canon law in support of its view of the nature of the polity of the church.

The witnesses for the Diocese conceded each of the following points:

(i) Neither the constitutions and canons of the national church nor of the Diocese contain any provisions establishing trusts of local parish property in favor of the general church or the Diocese (6T106-107);

(ii) No action had been taken by the general church with respect to the question of parish disaffiliation (2T5; 2T15-16; 2T74-75; 6T96-97);[2]

(iii) There was no understanding within the general church as to what happens in the event a parish withdraws, except that the canons of the general church no longer apply to a parish which has disaffiliated (2T75; 2T92-93);

2. Subsequent to the trial and almost coincident with the trial court's rendering of its decision in this case, on September 13, 1979, the general church, specifically citing the decision of this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), amended its national canons to create a trust "in all real and personal property held by or for the benefit of any Parish, Mission or Congregation" in favor of the general church and the diocese in which such parish, mission or congregation is located in the event of a disaffiliation.

(iv) A parish is free to legislate for itself on any matter as to which neither the general church nor the local diocese has acted (6T98);

(v) There are no sanctions for the non-payment by a parish of the quotas and assessments which finance general church and diocesan activities other than the loss by a non-paying parish of its vote at the diocesan convention (2T39-40);

(vi) The canons specifically leave the business of a parish to the vestry elected by its membership (Da 150); and

(vii) There are no procedures for review of the actions of a parish vestry or for removing or disciplining of vestry members acting contrary to the canons or directives of the general church (2T7-8; 2T17; 4T34-35; 6T116-117; Da150; Da301-302).

The parties presented contrasting expert testimony and documentary evidence as to the nature of the relationship between the dioceses and the parishes and the dioceses and the national church. Petitioners (the local parish) pointed to the "congregational" history of the Church and to the descriptions of the Church by prominent Episcopal commentators as a "federal commonwealth of 'parishes'" and as a "federation of independent parishes" (Da619; Da648; 3T5-6; 4T2-3; 6T80-82). The respondents conceded the "congregational" history of the Church in the United States (6T40), but attempted to show an evolution of the Church into a completely hierarchical body.

To demonstrate this evolution, respondents relied upon a series of documents relating to the ecclesiastical activities of the church, including sixteen separate forms dealing with appointments to the offices of lay reader, deacon and priest (Da542-556). Respondents' expert cited

as authority for his assertion that the parishes may not disaffiliate, the cumulative effect of canons relating to priests' vows, the requirement that vestry members be communicants, the alienation of consecrated churches,[3] repelling individuals from communion, the limitations on priests' officiating outside their parish boundaries and the ecclesiastical status of persons following dissolved or annulled marriages (6T149-150; 6T60; 6T69). In addition, respondents submitted evidence relating to the language of the vows taken by priests and the texts of the ceremonies and rituals of consecrating churches and instituting rectors into their parishes (4T73-74; 6T38-39; Da576-587). Respondents went so far as to present evidence dealing with the significance of "reserving the host" following communion (7T15-16).

While presenting their analysis as authoritative, respondents acknowledged that there is disagreement within the Church whether any body or person has the power to interpret questions of canon law in a definitive manner (6T100-101). Respondents also admitted that the sources of canon law include the constitution and canons of the church, the rubrics of The Book of Common Prayer and ancient ecclesiastical common law (6T107), and that a facial examination of the canons would not provide sufficient basis for defining the powers of the hierarchy (2T93-94).

Based on the testimony presented, the trial court found the general church to be of hierarchical polity with respect to both property and ecclesiastical matters. Peti-

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3. This canon was the only one cited by respondents which specifically dealt with property. The official Episcopal Church commentary on the canons of the Church introduced at trial described such canon as of "moral value" only and without legal significance (4T24-9).

tioners sought and obtained direct certification of the case by the Supreme Court of New Jersey so that it could be considered together with *Diocese of New Jersey*, which was then pending before that court.

The Supreme Court of New Jersey first decided *Diocese of New Jersey*. Unlike the case at bar, *Diocese of New Jersey* had been decided on cross-motions for summary judgment and so came before the court without a developed record. Based solely on the affidavits presented in that case, the court, by a 4-3 vote, found the Episcopal Church to be "a hierarchically structured organization which by virtue of its constitution and canons exercises pervasive control over its constituent parishes and missions." *Petition for Cert., Diocese of New Jersey*, App. A at A9. It further held that "it has been established that the Protestant Episcopal Church is a completely integrated hierarchical body . . . ." *Id.* at A10. The instant case was then determined to be controlled by the decision in *Diocese of New Jersey*. App. 5a.[4]

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4. St. Mark's originally incorporated under the New Jersey general religious corporation statute. It reincorporated in 1832 under an 1829 statute enacted to permit congregations to adapt to the "customs and usages" of the Episcopal Church. The 1829 statute specifically reserved to the affected religious corporations all of the "rights and privileges" accorded them under the general religious corporation statute, which included the right to acquire, hold and dispose of property free of external control.

It is apparent from both the majority and dissenting opinions that the New Jersey Supreme Court based its decision solely on its finding that the local parishes are subject to the control of the general church "as indicated in the constitutions and canon law of the national church and its dioceses." *Petition for Cert., Diocese of New Jersey*, App. A at A10. The reincorporation in 1832 was not relevant to the court's decision, because its use by the court to invalidate the congregation's corporate vote to disaffiliate would still have required a finding of hierarchical control, *i.e.*, a permanent surrender by the parish of its corporate power to

The three dissenting justices objected to the adoption by the majority of the *Watson* hierarchical deference option apparently left open by this Court in its opinion in *Jones v. Wolf*, 443 U.S. 595 (1979). The minority further argued that reliance upon *Watson* had involved the court in "an impermissibly extensive inquiry into church polity." *Petition for Cert., Diocese of New Jersey*, App. B. at A23. Citing the trial record in the instant case, the dissent pointed to the "sharp disagreement among experts on canon law and church history" as to the right of a parish to secede and take its property. *Id.* at A24.

Petitioners filed a timely motion for rehearing, requesting the court to consider the instant case on the basis of the record made at trial. That motion was denied on September 16, 1980. App. 15a.

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undo the decision which it had made in 1832. Indeed, the requirement of making this finding was specifically recognized by the trial court which grounded its decision on its conclusion that, "[b]ased on the documentary evidence and the testimony," the Episcopal Church is hierarchical. App. 13a. Further, the court would have had to deal with the petitioners' contention that the use of the 1829 statute to prevent disaffiliation would violate the "establishment clause" of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This issue was never mentioned by the court.

REASONS FOR GRANTING THE WRIT

The courts below have violated the limitations set forth in *Jones v. Wolf*, and this Court should clarify the extent of inquiry into church polity that is permissible for the settlement of church property disputes.

In *Jones v. Wolf*, this Court left undefined the extent to which a civil court may inquire into church polity for purposes of locating the unit of government (*e.g.*, the local parish corporation or the general church body) which has "ultimate control over church property." 443 U.S. at 605. The trial record made in the instant case demonstrates that the lower courts exceeded all constitutional limitations in the scope of their inquiry, and such record illustrates the need for this Court to establish the guidelines to be applied to judicial inquiry into religious questions in the resolution of church property disputes.

Jones v. Wolf permits states to resolve church property disputes on the basis of the rule of compulsory deference to hierarchical decrees where the ultimate authority over the use of church property has been surrendered to hierarchical authority. Petitioners' theory of the case from the beginning was that by merely affiliating with a general church, St. Mark's Church did *not* surrender its inherent power as a New Jersey corporation to dispose of its property in accordance with the decisions of its board of trustees. It was, and is, petitioners' position that there is nothing within the Episcopal Church structure and the documents that reflect that structure which vests in the general church an "ultimate power of control more or less complete" over the property affairs of the local parish.

Both the majority and the dissent in *Jones v. Wolf* also recognized that the mere affiliation of a local congre-

gation with a hierarchically organized church did not in and of itself subject the local church's property to the control of the general church. Rather, as Justice Powell pointed out in the dissent, it is necessary to ascertain "where within the religious association the rules of polity, accepted by its members before the schism, had placed ultimate authority over the use of the church property." *Id.* at 618-619 (Powell, J., dissenting). In some cases, the authority may be in the hierarchy. In others, the authority may be vested in the congregation, as in the case of a congregational denomination or a denomination which is hierarchical for ecclesiastical purposes but congregational for property purposes. Adams & Hanlon, *"Jones v. Wolf": Church Autonomy and the Religion Clauses of the First Amendment,* 128 U. Pa. L. Rev. 1291, 1331-32 (1980); Boston, *Church Property Disputes: The Trend and the Alternative,* 31 Mercer L. Rev. 559, 577-78 (1980).

The issue in this case is how the seat of authority is to be determined. The majority in *Jones v. Wolf* stated that the pinpointing of the location of the source of authority requires an examination of the "polity and administration" of the church. According to Justice Blackmun:

> In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association."

443 U.S. at 605 (quoting *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 723 (1976)). Justice Blackmun and the majority concluded that such "a careful examination" would constitute an "impermissible inquiry into church polity." *Id.*

The analysis in *Jones v. Wolf* that the compulsory deference approach may be used *only* where the scope of the hierarchical authority is identifiable without "a searching and therefore impermissible inquiry into church polity," echoes the concurring opinion of Justice Brennan in *Maryland & Virginia Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 369-70 (1970), in which he stated:

> [W]here the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy.

The record in this case presents precisely the type of situation adverted to by both Justices Blackmun and Brennan. The witnesses presented by the general church repeatedly conceded the absence of any church legislation with respect to a dissaffiliating parish and the lack of any clear statement of the authority of the hierarchy to restrict the power of a parish with respect to its own property. Rather, respondents' expert witness proposed that the court infer hierarchical authority over local parish property from the interplay of various canons, such as those dealing with the right of a person repelled from communion to appeal to the bishop and the power of the bishop to determine the ecclesiastical status of persons whose marriages have been dissolved or annulled in the civil courts (6T69). Respondents specifically admitted that, though the bishops are the key figures in the hierarchical structure, the bishops' powers cannot be adequately described by a facial examination of the church canons (2T93-94). As the three dissenting justices in the New Jersey Supreme Court

pointed out, the respondents never identified "any constitutional provisions or canons that address the right of a local parish to withdraw, what happens to its property when that occurs, or who is authorized to resolve a property dispute when a local body secedes." *Petition for Cert., Diocese of New Jersey,* App. B at A23.

Actual religious doctrine was, however, presented to the courts by respondents as a suggested basis for finding the general church to be the locus of control over property. Respondents' witness quoted extensively from prayers taken from the church liturgy and offered interpretations of those prayers to show that they demonstrate hierarchical control over property. Thus, over objection, the prayer quoted in the footnote to the Question Presented on page i of this Petition was read in its entirety into the record. The prayer was interpreted by respondents' expert as demonstrating that a building, once consecrated as an Episcopal church, always remains consecrated to that denomination. Similarly, the service for instituting a priest into his parish was read into the record and placed into evidence for purposes of demonstrating hierarchical control over personal property (4T71-75; Da576).

At another point in the proceedings, the respondents introduced evidence with respect to the practice of "reserving the host."[5] The stated purpose of this testimony was to show a religious veneration for particular items and thus the religious significance of the general church retaining legal control over parish property (7T15-17).

Apparently in reliance upon the testimony as to doctrine offered by respondents, the trial court and the New

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5. The practice involves preserving for future sacramental use consecrated wafers which have not been consumed during communion.

Jersey Supreme Court actually decided several issues of church law and doctrine which the general church itself had not decided. So, for example, the New Jersey Supreme Court interpreted the canon requiring diocesan consent to certain real estate transactions as proof of control over parish property. *Petition for Cert., Diocese of New Jersey,* App. A at A3, A11. Yet, not only did St. Mark's often fail to seek such consent, but the official annotated commentary to the general church constitution and canons, introduced at trial, states that, in the absence of any express agreement, the requirement of the canon can only be of "moral value and has no legal effect" (Da589).[6] The diocesan bishop himself stated that the canon was merely intended to "encourage" parishes to act "prudently" (2T11). Further, in holding the canon to have effect after disaffiliation, the court acted contrary to the statement of the diocesan bishop that the canons have no further effect upon a parish which has disaffiliated (2T75).

Similarly, the New Jersey Supreme Court interpreted the requirement to pay assessments as proof of diocesan control. Yet, the evidence at trial showed that St. Mark's had often refused to pay its assessments without any loss of control over its own affairs, and the church canons

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6. In *Diocese of New Jersey,* the companion to the instant case, the majority below commented that the provisions of *N.J.S.A.* 16:12-4, which require diocesan consent to parish real estate transactions, might serve as a neutral principle for finding for the general church. As noted in the dissent below to this case, such statute is inapplicable to St. Mark's because it was enacted after St. Mark's incorporation and because St. Mark's was incorporated before enactment of the first New Jersey statute reserving to the legislature the power to modify an existing corporate charter. App. 7a. *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819). In their brief to the Supreme Court of New Jersey, respondents conceded the inapplicability of the cited statute to St. Mark's.

themselves provide for loss of vote at the diocesan convention as the only penalty for non-payment of assessments.

Finally, both the trial court and the New Jersey Supreme Court explicitly declared the offices of wardens and vestrymen of St. Mark's vacant. App. 5a; 11a; 13a. Yet, respondents' witnesses conceded the absence of any provisions in the church canons for removal of vestrymen and wardens by the hierarchy (4T34-35), and that in fact there are no church judicatories with the jurisdiction to compel such removal (6T95-97). As noted by the dissenters below, "[e]ven if such a power [to remove wardens and vestrymen] exists, there is no showing that it has been exercised" by the general church in the instant case. *Petition for Cert., Diocese of New Jersey,* App. B at A21.[7]

Jones v. Wolf represents an important step in this Court's case-by-case development, since *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church,* 393 U.S. 440 (1969), of the guidelines applicable to the resolution of church property disputes. This case is the logical next step. Having permitted states to continue to apply the hierarchical deference test, so long as its application does not require a searching inquiry into church polity and doctrine, this Court must now define the scope of permissible inquiry. The instant case provides this Court with the record of a trial in which the basic inquiry was to determine whether authority over local church property had in fact been surrendered to hierarchical

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7. The New Jersey Supreme Court also cited the local parish's use of a standard prayer book and its adherence to changes in canons as further evidence of surrender of property control to the general church. *Petition for Cert., Diocese of New Jersey,* App. A at A3. The prayer book is exclusively ecclesiastical, and adherence to changes in canons is irrelevant in light of the admission that

authorities and offers the perfect setting for the establishment of the needed guidelines.[8]

The importance of this Court's setting down such guidelines is evidenced by the fact that approximately 25 church property disputes are heard by civil courts annually. Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1142 n.3 (1962). *See also* Annot., *Determination of Property Rights Between Local Church and Parent Church Body: Modern View*, 52 A.L.R.3d 324 (1973) (103-page review of church-property decisions). In addition, the issue is of great significance to many of the 150 or more churches which, like St. Mark's, have recently disaffiliated from or are in the process of disaffiliating from the Episcopal Church and are presently involved in litigation with such general church.[9]

If the issues raised by this case are not resolved and the boundaries for judicial inquiry into doctrine and polity

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there is no church legislation dealing explicitly with property control. Moreover, when the general church recently chose to change the prayer book, petitioners chose to disaffiliate.

8. While *Serbian Orthodox Diocese* also presented this Court with a detailed record, the issues involved were quite different. In *Serbian*, the question decided by this Court was not the power of the church to discipline its clergy, but the power of the civil courts to review the exercise of such power by the church. In the case at bar, the issue presented is whether in the first instance the general church has been given the power to control the local church's property, not how such power was exercised. As Justice White noted in his concurring opinion in *Serbian*, the determination of the power given to the church is "for the court's ultimate decision." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. at 725 (White, J., concurring).

9. *See e.g., Bishop & Diocese of Colorado v. Mote*, Docket No. 80CA0406 (Colo. App. 1980); *Protestant Episcopal Church v. Barker*, Nos. C188907, C189571, C189572, C190652 (Cal. Super. Ct., filed February, 1977).

not established, each civil court dealing with one of these recurring church property disputes will find itself in the position of the courts below, that is, resolving actual doctrinal questions to determine the locus of authority over property. In the absence of sufficiently definite guidelines, "[s]tate courts willing to inject their own preferences regarding church polity often will be able, in the absence of an express provision regarding church property, to adopt the presumption reflecting their own predilections." Adams & Hanlon, *"Jones v. Wolf": Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291, 1335 (1980).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to review and reverse the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

By: /s/ Bruce D. Shoulson
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APPENDIX A

MAJORITY AND DISSENTING OPINIONS OF THE SUPREME COURT OF NEW JERSEY IN DIOCESE OF NEWARK v. BURNS

SUPREME COURT OF NEW JERSEY

A-134 SEPTEMBER TERM 1979

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, and THE RIGHT REVEREND GEORGE E. RATH,

Plaintiffs-Respondents,

vs.

WILLIAM F. BURNS and THE RECTOR, WARDENS AND VESTRYMEN OF SAINT MARK'S CHURCH IN ORANGE, NEW JERSEY,

Defendants-Appellants.

Argued April 21, 1980—Decided July 24, 1980.

On certification to the Superior Court, Chancery Division.

Bruce D. Shoulson argued the cause for appellants (*Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan*, attorneys; *Bruce D. Shoulson* and *Robin A. Rolfe*, on the briefs).

Eugene M. Haring argued the cause for respondents (*McCarter & English*, attorneys; *Eugene M. Haring* and *Gita F. Rothchild*, on the brief).

Adrian M. Foley, Jr. submitted a brief on behalf of *amicus curiae* The Roman Catholic Diocese of Newark (*Connell, Foley & Geiser,* attorneys; *Robert J. Kelly,* on the brief).

The opinion of the Court was delivered by SULLIVAN, J.

This case is before us on certification of defendants' appeal pending unheard in the Appellate Division. 82 *N.J.* 268 (1979). The factual background and issues involved are almost identical to those considered in *The Protestant Episcopal Church v. Graves,* 83 *N.J.* 572 (1980), also decided today. Plaintiffs herein are the Diocese of Newark of the Protestant Episcopal Church (Diocese), the Trustees of the Episcopal Fund and Diocesan Properties and the Diocesan Bishop. Defendants are St. Mark's Church in Orange, New Jersey, its rector, wardens and vestrymen.

As in *Graves,* the essential facts are not in dispute. St. Mark's Church was originally incorporated in 1827 as "a congregation of Christians of the Protestant Episcopal church." In 1832, St. Mark's reincorporated under the act of February 17, 1829 entitled "An Act to incorporate religious societies worshipping according to the customs and usages of the Protestant Episcopal Church" and, pursuant to the provisions of that act changed its corporate name to "The Rector, Wardens and Vestrymen of St. Mark's Church in Orange, New Jersey."[1] Following the division of New Jersey into two dioceses of the Protestant Episcopal Church, St. Mark's became a part of the Diocese of Newark.

---

1. In 1961 the corporate name was changed to read "West Orange" instead of "Orange."

St. Mark's acquired its first piece of property about 1828 and built its church on the site. Thereafter, additions were made to the church building and additional property acquired. St. Mark's now owns approximately three acres of land on which is located the church, rectory, a frame house and parish hall. Financing of the acquisitions and construction was by local funds only. None of the deeds of conveyance to St. Mark's make any reference to a trust in favor of the Diocese or the Protestant Episcopal Church.

Until 1977, St. Mark's, in accordance with Episcopal law, participated fully in Diocesan and Church activities. It sent delegates to the Diocesan Convention and regularly paid its Diocesan assessments and quotas. Following the enactment of the 1877 supplement to the laws regulating the affairs of the Protestant Episcopal Church, *L.* 1877, *c.* 56, now *N.J.S.A.* 16:12-4, St. Mark's, in conformity with the requirements of that statute, generally sought Diocesan consent to the transfer and mortgaging of its real estate.

Over the years, St. Mark's had received numerous donations and bequests of funds some of which were delivered to the Trustees of the Diocesan Episcopal Fund for management. It is undisputed that the funds belong to St. Mark's and that of the approximately $192,000 (at cost) presently held by the Trustees, only $3,788.98 thereof is subject to an express reversionary interest in favor of the Protestant Episcopal Church.

In 1977, as a result of the same doctrinal disputes as precipitated the *Graves* litigation,[2] the Wardens and Vestrymen of St. Mark's notified the Diocese that St. Mark's

---

2. The disputes involved, *inter alia*, ordination of women to the priesthood and changes in the Book of Common Prayer.

was terminating its affiliation with the Diocese and the Protestant Episcopal Church. Pursuant to resolutions adopted by the vestry and congregation, St. Mark's affiliated itself with the Anglican Catholic Church, a denomination other than the Protestant Episcopal Church, and demanded the return of funds being held by the Diocese for the benefit of St. Mark's. Bishop Rath immediately "inhibited" defendant Rev. Mr. Burns, the Rector of St. Mark's, from performing priestly duties and thereafter deposed him. See *Graves* p. 575. A substitute priest was sent to St. Mark's by the Bishop but was refused admittance and denied permission to officiate at parish services. This suit followed. It sought an injunction against defendants prohibiting them from exercising control over parish property and a declaration that all property of St. Mark's was held in trust for the use and benefit of the Diocese of Newark and the Protestant Episcopal Church.

The case was tried over a period of six days, at the conclusion of which the trial judge ruled in favor of plaintiffs. He held that the individual defendants had no interest in the real or personal property of St. Mark's and "that title to all of said properties is in St. Mark's." The judgment also provided that the Rev. Mr. Burns, having been deposed as a priest of the Protestant Episcopal Church, was not entitled to the office of Rector of St. Mark's and that the other individual defendants, having renounced their affiliation with the Diocese and Church, were not entitled to vote or hold office in St. Mark's Church. Defendants were enjoined from exercising any control over parish property and prohibited from interfering with the use of the premises or with the conduct of the affairs of defendant corporation by plaintiffs or such persons designated by plaintiffs.

As noted, defendants' appeal was certified while pending unheard in the Appellate Division. Defendants' argument on appeal is similar to that made by the appellants in *Graves*. Defendants argue that such hierarchical structure as the Protestant Episcopal Church has, extends only to doctrine. In the absence of trust provisions, defendants claim that the authority of the hierarchy does not encompass local church property, which remains in the control of the local congregation. It is contended that the offices of Rector, Wardens and Vestrymen of St. Mark's Church are not vacant and that the Church hierarchy does not have the right to determine the eligibility for such offices. Additionally, they assert that the principle of compulsory deference to the determination of a hierarchical church body in property disputes has never been the law in New Jersey and that this Court should adopt the neutral principles of law approach for resolving church property disputes.

All of these contentions as well as the ancillary points raised by defendants have been considered and disposed of in our opinion in *Graves*. There we approved the hierarchical church approach utilized in *Watson v. Jones*, 13 *Wall.* 679, 20 *L.Ed.* 666 (1872). Applying that approach to this case, plaintiffs are entitled to the relief granted. As the trial judge noted, the title to all property real and personal remains in St. Mark's Church which was and still is incorporated as an affiliated member of the Protestant Episcopal Church. The Rev. Mr. Burns has been deposed as a priest of the Protestant Episcopal Church and is ineligible to serve as rector of St. Mark's. Likewise, the other individual defendants have disaffiliated themselves from the Protestant Episcopal Church and thereby automatically terminated their eligibility to hold office as Wardens and Vestrymen of St. Mark's.

As was noted in *Graves*, the individual defendants are free to disassociate themselves from the Protestant Episcopal Church and join another denomination. No court can interfere with or control such an exercise of conscience. However, they may not take the church property with them. The judgment of the trial court is affirmed for the reasons set forth herein and in our opinion in *Graves*, also decided today.

Chief Justice Wilentz and Justices Clifford, and Pollock join in this opinion.

Justice Schreiber has filed a separate dissenting opinion in which Justices Pashman and Handler join.

SCHREIBER, J., dissenting.

I dissent essentially for the same reasons expressed in my dissent in the companion case, *Protestant Episcopal Church v. Graves*, 83 *N.J.* 594 (1980), decided this day. Moreover, to the extent that the majority relies upon statutes enacted after the Act of February 17, 1829, *L.* 1828, p. 71, under which St. Mark's was reincorporated in 1832, such reliance would appear to be misplaced. The reserved power to modify a corporate charter which retroactively affects rights of stockholders *inter se* and with the corporate entity, does not appear to have come into existence until February 14, 1846. *L.* 1846, p. 16, § 6. See *Trustees of Dartmouth College v. Woodward*, 17 *U.S.* (4 Wheat.) 518, 4 *L.Ed.* 629 (1819).

Justices Pashman and Handler join in this opinion.

APPENDIX B

LETTER OPINION OF SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, DATED SEPTEMBER 11, 1979

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Re: The Diocese of Newark, et al
v. William F. Burns, et al
Docket No. C-4164-77

Dear Sirs:

In the letter opinion dated September 6, 1978, the court outlined to a considerable extent the parties and the issues to this action and entered an order restraining the defendants from engaging in certain activities as well as directing that Archdeacon Grant be allowed to conduct services. The Appellate Division modified the order as to Archdeacon Grant.

By subsequent order, the persons who were last elected as Wardens and Vestrymen of St. Marks were added as defendants.

In the aforementioned opinion, this court relied in part upon *Kelly v. McIntire*, 123 *N.J. Eq.* 351 (Ch. 1938); *The Protestant Episcopal Church v. Graves*, 161 *N.J. Super.* 230

(Ch. Div. 1978), aff'd, 167 *N.J. Super.* 563 (App. Div. 1979).

The matter is now before the court for decision after a full hearing on all issues tendered by the defendants. In substance, defendants assert that the *Graves* decision is not applicable because it is based upon statutes which are not applicable to St. Marks; under applicable law St. Marks was not part of a hierarchical church, and under *Jones v. Wolf*, – *U.S.* –, 99 *S. Ct.* –, 61 *L.Ed.2d* 775 (1979), this court must decide this case based solely on "neutral principles". The defendants urge "neutral principles" means title documents. The court will consider each of these contentions in the order stated.

The parties and the issues in *Graves, supra,* are similar to those before this court. Judge Ackerman summed up his conclusions:

> The court further holds that *Kelly* has not been undermined by recent Supreme Court decisions. Rather, *Kelly* adopted the *Watson* approach specifically approved by Justice Brennan in *Sharpsburg* and apparently approved by the court in *Milivojevich*. Under this approach a local church which is part of a hierarchical organization holds all its property in implied trust for the superior ecclesiastical authority and cannot use that property for any purpose not sanctioned by the higher authority. This is so regardless of the number of the members of the local body opposed to the higher authority, or of the source of the funds with which the property was purchased.
>
> Applying these principles to the instant case, the court finds plaintiffs entitled to the relief sought as a matter of law. Defendants are fully entitled to withdraw from

> the Diocese if they so desire, but their property is held in trust for the Diocese, and cannot be used for any purpose not sanctioned by the Diocese * * * * [161 *N.J. Super.* at 255-56].

This court does not understand that Judge Ackerman premised his decision on *N.J.S.A.* 16:1-25 and 4. It does understand that the decision is premised on the fact that Graves was deposed by the bishop and those with him withdrew from the PEC. But assuming, *arguendo,* this court's understanding is wrong, it does not change the result to be reached here. There is no dispute that a certificate was filed on July 9, 1832 with the Clerk of Essex County that stated in relevant part:

> * * * that this church embrace the privileges of the Act, entitled "An Act to incorporate religious Societies, worshipping according to the customs and usages of the Protestant Episcopal church passed [*sic*] Feb. 17, 1892 [*sic*: 1829].

The Act of 1829 provided in part:

> Sec. 5. AND BE IT ENACTED, That the qualification of voters at the annual elections shall be conformable to the constitution and principles of the Protestant Episcopal Church in New Jersey.
>
> Sec. 7. AND BE IT ENACTED, That when a vacancy shall occur in the office of minister or rector, by death, removal or otherwise, the said wardens and vestrymen (two-thirds of them concurring in the choice) may choose some fit person, duly qualified, to act as minister or rector of said church, agreeably to the constitution of the Protestant Episcopal Church in the United States of America * * * *

See *N.J.S.A.* 16A:12-10 and 7 for present statutes.

There can be no dispute that St. Marks became subject to those provisions of law in 1832. The Legislature did not impose that law on St. Marks. It embraced them. It was then a member of the Diocese of New Jersey with representatives at the General Convention.

Defendant Burns was deposed by Bishop Rath as a priest. His successor had to be chosen as provided in *N.J.S.A.* 16:12-7.

There is no dispute that all the named individual defendants as Wardens and Vestrymen withdrew from the PEC; hence became ineligible to hold office in St. Marks.

The real dispute in this controversy is not over who is entitled to the property. Legally, it is vested in St. Marks corporation. The real question is whether defendants can qualify for their respective offices. The answer to this question lies in the interpretation and application of the Constitution and Cannons [*sic*] of the Protestant Episcopal Church by the authorities therein designated. The Bishop and the Standing Committee [*sic*]. See P-40 and P-41. This court under New Jersey law accepts their determination as final. *Serbian Eastern Ortho. v. Servian [sic] Eastern Ortho.*, 106 *N.J. Super.* 22 (App. Div. 1969), certif. den. 54 N.J. 516 (1969), *cert.* den. 397 *U.S.* 961, 90 *S. Ct.* 994, 25 *L.Ed.2d* 254 (1970); *Servian [sic] Orthodox Diocese v. Milivojevich*, 426 *U.S.* 696, 96 *S. Ct.* 2372, 49 *L.Ed.2d* 151 (1976).

The reference in the majority opinion in *Jones v. Wolf, supra,* to the courts not being bound by the decision of ecclesiastical authorities has to be understood in context. The majority recognized and stated that where an ecclesiastical tribunal acts on religious qualifications based on doctrine or polity the courts are bound.

> As a corollary to this commandment, the [First -ed.] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of hierarchical church organization * * * * (Citations omitted). [61 *L.Ed.2d* at 784].

The majority then goes on to say that the states are free to select a variety of means of resolving disputes over church property and concluded by saying it could not write the law for Georgia.

It recognized that even under title paper analysis used in the neutral principles approach:

> If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy then the court must defer to the resolution of the doctrinal action issue by the authoritative ecclesiastical body. *Serbian Orthodox Diocese,* 426 *U.S.* at 709. [*Jones,* 61 *L.Ed.2d* at 785].

Justice Brennan was a member of the majority in *Jones v. Wolf, supra.* In his concurring opinion in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg,* 396 *U.S.* 367, 90 *S. Ct.* 499, 24 *L.Ed.2d* 582 (1970), he stated that there were at least three possible approaches:

1. *Watson v. Jones,* 13 *Wall* 679, 20 *L.Ed.* 666 (1872);
2. Neutral principles of law; and
3. Special state statutes governing church property arrangements in a manner that precludes state interference in doctrine.

New Jersey has enacted a number of statutes for use by religious corporations at their election. In *Graves,*

supra, at p. 234, it is stated St. Stephens was not incorporated under *N.J.S.A.* 16:12-1 but under 16:1-1 *et seq.*, the general religious corporation act. However, there is no dispute that St. Marks was incorporated under a special act for churches associated with the Protestant Episcopal Church.

This court concludes that based on the evidence and the testimony, plaintiff Diocese acting through the Bishop had a right to send Archdeacon Grant to perform services and has such right now.

There is no evidence that any action has been taken under *N.J.S.A.* 16:12-16 to declare the parish extinct. The court further finds that under the predecessor of *N.J.S.A.* 16:12-10 quoted above those who hold office must meet the qualifications, constitution and cannons [*sic*] of the Protestant Episcopal Church in the diocese in which the parish is located. The court concludes that none of the defendants can now meet that qualification.

This court does not find it necessary to determine whether any of the statutes enacted subsequent to the Act of 1829 are applicable to St. Marks to decide this matter.

Based on the documentary evidence and the testimony, this court concludes that the Protestant Episcopal Church in the United States of America, The Diocese of Newark, and St. Marks were all part of a hierarchical church within the concept of *Watson v. Jones, supra*, and the New Jersey cases cited in *Graves*. The court concurs with Judge Ackerman that New Jersey, unlike Maryland, has applied the implied trust concept for hierarchical churches.

In respect to the contention that the majority decision in *Jones v. Wolf, supra*, requires this court to decide the case on neutral principles, this court disagrees. There, the Georgia courts had undertaken to decide the case on neu-

tral principles of title law. The Supreme Court majority respected that choice. But the majority concluded the Georgia courts had not articulated the basis for its decision as to why the majority in a noncongregational local church should prevail and remanded.

As heretofore noted, Justice Brennan was part of the majority. The majority did not overrule *Watson v. Jones, supra,* or criticize it. As this court understands the law of New Jersey, *Watson v. Jones* is followed in New Jersey.

The court concludes that the Bishop of the Diocese has the right to designate a new Rector for the reasons set forth in exhibits and testimony and that he has deposed Rev. Burns; that none of the individuals can vote or hold office in St. Marks because of the qualifications of the constitutions and cannons [*sic*]; that the defendants have no interest in the property real or personal of St. Marks; and that counsel for plaintiffs shall submit an order fixing a time by which Rev. Burns shall vacate the rectory.

The court will sign an interim order restraining Rev. Burns from conducting services at St. Marks and prohibiting interference with the designee of the Bishop conducting such services.

Because the court has concluded that none of the individual defendants have any right to hold office, or vote, in St. Marks as a corporation and St. Marks has title to the real and personal property, it is not necessary to construe any of the instruments.

Very truly yours,

/s/ Arthur C. Dwyer
ARTHUR C. DWYER, J.S.C.

APPENDIX C

ORDER OF SUPREME COURT OF NEW JERSEY, DATED SEPTEMBER 16, 1980, DENYING PETITIONERS' MOTION FOR REHEARING

SUPREME COURT OF NEW JERSEY

M-34 SEPTEMBER TERM 1980

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND & DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, AND THE RIGHT REVEREND GEORGE E. RATH,

Plaintiffs-Respondents,

vs.

WILLIAM F. BURNS, & THE RECTOR, WARDENS & VESTRYMEN OF SAINT MARK'S CHURCH IN ORANGE, N.J.,

Defendants-Movants.

No member of the Court who voted with the majority having moved the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of September, 1980.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk

SUPREME COURT U.S.
FILED
JAN 2 1981
MICHAEL RODAK, JR., CLERK

No. 80-887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM F. BURNS and THE RECTOR, WARDENS AND VESTRYMEN OF ST. MARK'S CHURCH IN ORANGE, NEW JERSEY,

Petitioners,

vs.

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK and THE RIGHT REVEREND GEORGE E. RATH,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Should *certiorari* be denied when the writ is sought upon the basis of petitioners' own evidence (admitted only over respondents' objection and in rebuttal thereto), which would represent an impermissible search of religious law and usage, when that evidence was not relied upon by the trial court or the New Jersey Supreme Court?

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No. 80-887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM F. BURNS and THE RECTOR, WARDENS AND VESTRYMEN OF ST. MARK'S CHURCH IN ORANGE, NEW JERSEY,

Petitioners,

vs.

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK and THE RIGHT REVEREND GEORGE E. RATH,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The majority and dissenting opinions of the Supreme Court of New Jersey, which appear as Appendix A to the Petition for a Writ of Certiorari, are reported at 83 N.J. 594, 417 A.2d 31 (1980).

The majority and dissenting opinions of the Supreme Court of New Jersey in *Protestant Episcopal Church* v. *Graves,* argued and decided the same day as this case, are reported at 83 N.J. 572, 417 A.2d 19 (1980).

The final opinion of the Superior Court of New Jersey, Chancery Division, is not reported and appears as Appendix B to the Petition for a Writ of Certiorari. The Opinion of the Superior Court of New Jersey, Chancery Division, granting preliminary relief to plaintiffs, dated September 6, 1978, and in which the Court "outlined to a considerable extent the parties and the issues" in the suit (Appendix B to Petition), is set forth in Appendix A to this brief.

Constitutional Provisions Involved

The decisions of the court below were based on New Jersey law which is consistent with the First Amendment of the United States Constitution. Hence, there are no constitutional provisions involved, nor are there any constitutional questions raised by this case.

Statement of the Case

(a) *Facts giving rise to this case.* In 1976 the General Convention of the Episcopal Church,[1] the highest judicia-

[1] The preamble to the Constitution of the Protestant Episcopal Church in America (Da129) provides, "The Protestant Episcopal Church in the United States of America, otherwise known as the Episcopal Church (which name is hereby recognized as also designating the Church) * * *." Reference will be made to the Church as the Episcopal Church.

tory of the church, voted to amend the canons to permit the ordination of women as priests[2] and to authorize and require the use of a new prayer book.[3] At the time of that action by the General Convention, and for some time thereafter, the offices of Rector, Wardens and Vestrymen of St. Mark's Church were held by the petitioners.

Thereafter, as a result of the action by the General Convention, the petitioners renounced their affiliation with the Episcopal Diocese of Newark[4] (Da518; Da523; 5T4; 5T8) and subsequently affiliated with a newly-formed denomination known as the Anglican Catholic Church. (Da523; 5T12)

On October 17, 1977 the Bishop of Newark inhibited the petitioner Burns from performing his priestly duties (1T19-20) and, in due course, on June 19, 1978, deposed him from the priesthood (Da534-535; 1T21). On June 25, 1978 the Bishop sent his delegate, Archdeacon Grant, to St. Mark's to conduct services. The Archdeacon was refused admission to the church building and denied permission to conduct parish services. (1T21)

(b) *The proceedings below.* On July 13, 1978, the respondents filed their Complaint in the Chancery Division of the New Jersey Superior Court seeking an injunction

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[2] Title III, Canon 9, §1 (1976).

[3] Title II, Canon 3; Constitution, Art X.

[4] The Episcopal Diocese of New Jersey was incorporated by special act on November 20, 1826. Thereafter in 1874, as the northern part of the State became more densely populated, the Diocese of Northern New Jersey, later called the Diocese of Newark, was formed or carved out of the Diocese of New Jersey, and comprises those parishes in the northern 7 of the 21 counties of New Jersey.

against the petitioners' use of the parish property (Da4). On September 13, 1979, the Chancery Division of the Superior Court, granted permanent injunctive relief after a plenary hearing (Da76).[5] This judgment was affirmed by the Supreme Court of New Jersey. (83 N.J. 594, 417 A.2d 31 (1980); Appendix A to Petition).

The respondents had moved for summary judgment, contending that, as in *Protestant Episcopal Church* v. *Graves,* 83 N.J. 572, 417 A.2d 19 (1980), petition for *cert.* filed *sub nom. Moore* v. *The Protestant Episcopal Church in the Diocese of New Jersey* (October 21, 1980) (No. 80-675) (to which reference is hereinafter made as "Graves"), there were no material issues of fact. This motion, however, was denied on January 19, 1979 (Da67) upon petitioners' representation that they wished to present factual evidence.

(c) *The course of the trial.* At the six day trial in February and March, 1979, respondents' case in chief consisted of relatively brief testimony by Bishop George E. Rath, the recently retired Bishop of the Diocese of Newark.[6]

Bishop Rath was called as a witness essentially to establish the renunciation by the petitioners of the Episcopal

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[5] Shortly after the Chancery Division's final judgment, a new Vestry was elected and on January 6, 1980, the Reverend Harry Ellsworth Smith was installed by the Bishop of Newark as the Ninth Rector of St. Mark's Episcopal Church. The Church has been operating as a vital member of the Episcopal Diocese of Newark since the judgment of the Superior Court, Chancery Division, was rendered.

[6] The Rt. Rev. George E. Rath was the Diocesan Bishop of Newark from January 1, 1974 to December 31, 1977, and accordingly held the office at all material times herein. He was succeeded, on January 1, 1978 by The Rt. Rev. John Shelby Spong, the present Diocesan Bishop of Newark.

Church (1T14), the deposition of the petitioner Burns (1T20-21), the refusal by the petitioners to permit the Bishop's delegate to conduct services at St. Mark's (1T21), and St. Marks' representation by delegates to the annual Diocesan Convention for 150 years (1T22). None of these facts were contested by the petitioners. Bishop Rath also testified, essentially through the introduction of certain documents, with respect to his usual official duties as the Diocesan Bishop. (1T26-39)

At the conclusion of the respondents' brief case in chief, the petitioners, who conceded that the Rector had been deposed (Pet. at 6), introduced, over plaintiffs' continuing objection (3T2-17 to 4-6; 4T11-13),[7], [8] a great volume of

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[7] The Chancery Division of the New Jersey Superior Court was established pursuant to the New Jersey Constitution of 1947 and is the direct descendant of the former Court of Chancery of New Jersey. See, II Convention Proceedings 1614 *et seq.* (1951); N.J. CONST. Art 6, §3, ¶3. It is an equity court and accordingly evidence is frequently admitted (though not relied upon) which would be held inadmissible in a law court, particularly with a jury.

[8] Petitioners contend that the federal question in this case was presented because "petitioners raised the issue of the impermissibility of delving into the polity and religious doctrines of the general church. . . ." (Petition at 3) Petitioners are simply wrong. All of the inadmissible evidence was introduced by petitioners over respondents continuing objection, or by respondents in rebuttal to the objectionable testimony of petitioners' experts. (3T2-17 to 4-6; 4T11-13)

This is but one of numerous misstatements which appear in the Petition. For example, petitioners state that the decisions below were "doctrinal" and "passed upon interpretations of various provisions of Church canons, Rubrics of the Book of Com-

(Footnote continued on following page)

irrelevant and inadmissible evidence to support their somewhat novel contentions that the parish and its relation to the Diocese should be viewed as that existing at its founding in 1827, and that somehow the Church is "congrega-

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(Footnote continued from preceding page)

mon Prayer and Customs and Ceremonies of the Church (Petition at 3). Even a cursory examination of the decisions below refutes this statement.

Petitioners further assert that throughout its history, St. Mark's functioned as an independent church organization with respect to its business affairs. To the contrary, the record amply demonstrates that the parish turned to the Bishop for approval before engaging in property transactions (83 N.J. at 596, 417 A.2d at 33) and, operating under the customs and usages of the church, were subject to the numerous canons relating to possession and control of both real and personal property. (See, e.g., Title I, Canon 5; Title I, Canon 6; Title I, Canon 7; Title I, Canon 12; Title II, Canon 7; Title III, Canon 18; Title III, Canon 20). Moreover, St. Mark's participated in the adoption of these Canons through the representation by their delegates at Diocesan Conventions for 150 years, and the Diocese's representation at each General Convention. This is to say nothing of the Bishop's organic ecclesiastical and pastoral relationships with the parish throughout its history.

Nor did the respondents "concede the 'congregational' history of the Church in the United States" (Petition at 7). Rather, as the transcript reveals at the pages cited by the petitioners, respondents' expert on rebuttal, Dr. Foster, stated that the Church was "congregational only really in the sense that the various structures above a congregation that existed before the Revolution had been swept away by the hostilities". Dr. Foster went on to say seven lines later: "The surprising thing and the striking thing is how quickly that changed". (6T40-3)

These are but a few of the many inaccurate and misleading characterizations of the evidence made in the Petition. None of these misstatements, however, should bear in any way on this Court's decision, inasmuch as the operative facts *relied on* by the New Jersey Courts were simple and undisputed. See pages 7-8, *infra*.

tional" in those aspects affecting property rights, while hierarchical in spiritual and eccelsiastical matters. The petitioners introduced voluminous testimony on the history and nature of the Church (2T138-3T7; 4T2-3), and days of testimony by its experts with respect to canon law on the history and interpretation of various canons, both current and ancient, and the Church Constitution (4T8; 4T15-25; 4T27-28; 4T29-30; 4T38-39; 4T40-42; 4T43-49; 4T88-92), as well as the significance of the absence of various canons or Constitutional provisions (4T31-37; 4T39-40; 4T49-50). This testimony and documentary evidence was, quite properly, not relied upon by any court below. The expert testimony presented on behalf of respondents, referred to by petitioners in their Petition for a Writ of Certiorari, was solely by way of rebuttal to petitioners' inadmissible testimony which was properly ignored by the courts below. Since the courts below did not rely upon the evidence as to ecclesiastical law and usage presented on behalf of the petitioners (or that presented by the respondents in rebuttal), this case is almost identical with *Graves,* which was decided by summary judgment.

(d) *The operative facts.* Far from relying upon any expert testimony or other evidence of religious doctrine or practice, the decisions below were based upon the following operative, determinative and uncontroverted facts:

(1) In 1827 St. Mark's Church incorporated as "a Congregation of Christians of the Protestant Episcopal Church" (Da98);

(2) In 1832 the parish embraced the privileges of an 1829 New Jersey statute "to incorporate religious societies, according to the customs and usages of the Protestant Episcopal Church," Act of February 17, 1829, L.1828, p. 71, by reincorporating under its provisions;

(3) Since the General Convention of 1789 (6T93; 3T5), the "customs and usages" of the Episcopal Church have included the Canons and Constitution of the Church;

(4) From 1827 until 1977 St. Mark's, in accordance with Episcopal law, participated fully in Diocesan and Church affairs, sending delegates to every Diocesan Convention, paying assessments and quotas imposed by the Diocese, participating in the creation of legislation for the governance of the Church, and subscribing and adhering to the Constitution and Canons of the Church, 83 N.J. at 596, 417 A.2d at 32 ;

(5) Title to the real and personal property is held by the corporation of St. Mark's Church. (Da98; Da101; Da103)

(6) The Church organization consists of councils ascending from the Vestry (Title I, Canon 13) to the Diocesan Convention (Constitution, Art. II) to the General Convention (Constitution, Art. I), which is supreme. The clerical orders of the Church ascend fr m deacons (Title III, Canon 23) to priests (Title III, Canon 11) to bishops (Constitution, Art. II).

(7) In 1977 the individuals holding office as Rector, Wardens and Vestrymen affirmatively renounced their affiliation with the Diocese of Newark and the Episcopal Church (Da513; Da523; 5T4; 5T8);

(8) As a consequence of this renunciation, the Rector of St. Mark's was deposed as an Episcopal priest by the Bishop of the Diocese of Newark (Da534-535; 1T21).

(9) Episcopal Church law requires that the Rector of a parish be an Episcopal priest (3T33; 4T65) and that the Wardens and Vestrymen be communicants or adherents of the Church (4T67).

The Courts of New Jersey, without reference to issues requiring the determination of religious policy or doctrine, were only required to find, and did find, that upon voluntary disaffiliation by the Wardens and Vestrymen and the deposition of the Rector, the parish offices became vacant (83 N.J. at 598; 417 A.2d at 34). Title to the Church property remained in the St. Mark's corporation which has always been, and by its charter must be, a parish subject to the customs and usages of the Episcopal Church.

Reasons for Denying the Writ

This case does not arise out of a dispute between rival factions of a church congregation, each declaring itself entitled to church property by virtue of its adherence to the true faith. It presents no question with respect to the propriety or regularity of religious proceedings. It turns on no question with respect to nuances of church law, custom or tradition. Nor is there any issue regarding title to church property; the parties agree that title is vested in St. Mark's corportaion.

(a) *No impermissible analysis of religious law.* Unlike those decisions which may merit constitutional review, the decisions below involved no searching inquiry into religious law and usage. This case rests on the admitted renunciation of the Episcopal Church by the former Rector, Wardens and Vestrymen of St. Mark's—whatever the religious significance of those offices may be. It rests on the admitted and uncontested deposition of the petitioner Burns by the Bishop—whatever the religious source of authority of the Bishop may be. It rests on the parish's incorporation under a statute permitting the incorporation of churches according to the customs and usages of the Episcopal Church which include the Constitution and Canons of that church—whatever they may be.

If the courts below had engaged in a close examination and interpretation of religious law and usage, then this case might present a substantial constitutional question and provide an appropriate vehicle for this Court's further elaboration of First Amendment limitations on state court proceedings. Such is not this case.

Jones v. *Wolf,* 443 U.S. 595, 99 S.Ct. 3020 (1979), permits states to adopt either of two approaches to the resolution of church property disputes: by application of neutral principles of law or, in the case of a hierarchical church, where consideration of doctrinal matters would otherwise be involved, by deference to the authoritative resolution within the Church itself. *Id.* at 602, 99 S.Ct. at 3025. Both the majority and the dissenters in *Jones* v. *Wolf* appear in accord that a court is constitutionally prohibited from basing its decision on a "searching and therefore impermissible inquiry into religious law and usage." 443 U.S. at 605, 99 S.Ct. at 3026; *See also, Serbian Eastern Orthodox Diocese for the U.S. and Canada* v. *Milivojevich,* 426 U.S. 694, 723, 96 S.Ct. 2372, 2387 (1976) (hereinafter "*Serbian*").

No such searching inquiry is required for the proper disposition of this case. There is no question here as to the meaning or proper application of church law. The petitioners have renounced it—however it be interpreted. Moreover, the petitioners have not contested Burns' deposition. On the other hand, if the Court were to entertain the petitioners' contention that a fine distinction between parish property and ecclesiastical law can be spun out of canon law and the common law ecclesiastical, then the Court would be bogged in that quagmire of religious law and usage which is Constitutionally off-limits.

Such an inquiry among the subtleties of church law and custom would, moreover, if resolved in the petitioners'

favor, nullify the Bishop's deposition of Burns, even though it was never contested or appealed and is conceded. It would, in addition, overrule canons, clear to thoroughly secular examination, requiring that the Rector have the use and control of a parish church and that he must be an Episcopal priest. Title III, Canon 20, §1(b); Canon 22, §3; Canon 24; (3T33; 4T65).

In *Jones* v. *Wolf*, the majority suggested the desirability of a provision in the constitution of a general church providing "an express trust in favor of the denominational church", 443 U.S. 606, 99 S.Ct. at 3027, and "what is to happen to church property in the event of a particular contingency". *Id.* at 603, 99 S.Ct. at 3025. In *Graves* the New Jersey Supreme Court adverted to the General Convention's adoption of such a canon in 1979 (83 N.J. at 581, 417 A.2d at 24; Title I, Canon 6, §4 (1979)).[9] Even before that, however, the canons clearly provided that "* * * the Rector shall at all times be entitled to the use and control of the church and parish buildings * * *". (Title III, Canon 20 §1(b)). There is no necessity to make an impermissible inquiry here into such things as the theological sources of the priestly office and its duties and obligations, or the Apostolic succession—or, as the petitioners would require—the inferences which arguably might be drawn regarding the relationship between religious and ecclesiastical precepts and the control of property by religious orders and church councils. The highest judicatory

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[9] Inasmuch as the adoption of Title I, Canon 6, §4 has made clear that property held by the parish is held in trust for the general church organization, a decision by the Supreme Court in this case would be of no precedential value. All of the property disputes of this nature that can arise as a result of a parish's disaffiliation from the Episcopal Church have already occurred, and have been resolved by the lower courts in a uniform manner. See Footnote 12 at page 15, *infra*.

of the Church has adopted a canon reflecting the established customs, practices and usages of the Church (*Graves,* 83 N.J. at 581), and, in any event, the Canons to which the petitioners subscribed, examined purely secularly, clearly state that the Rector is entitled to possession and control of the parish buildings (Title III, Canon 20), and that he must be an Episcopal priest (Title III, Canon 22, §3; Canon 24).

(b) *The deference rule as applied in this case. Jones* v. *Wolf* reaffirms that a state is constitutionally free to follow either the neutral principles approach, such as Georgia's, or the deference approach, so long as there is no impermissible inquiry into Church doctrine. (443 U.S. at 602-605; 99 S.Ct. at 3025-3027). The common law of New Jersey follows the deference doctrine, and, indeed, has done so since well before *Watson* v. *Jones,* 80 U.S. 679, 20 L.Ed. 111 (1872). *American Primitive Society of Paterson* v. *Pilling,* 24 N.J.L. 653 (Sup. Ct. 1855); *Den* v. *Bolton,* 12 N.J.L. 206 (Sup. Ct. 1830).

A *facial* examination of the Constitution and Canons of the Episcopal Church is all that is required to determine that its *structure* is hierarchial, consisting of ascending councils from the vestry, through the Diocesan Convention to the General Convention, which is supreme. It is also apparent, without any inquiry into religious precepts or beliefs, that the structure of clerical orders is hierarchical, ascending from deacons, to priests to bishops.

The simplicity of this case is apparent when compared with *Serbian.* There the Illinois Supreme Court's examination into church constitutional provisions and matters of "ecclesiastical cognizance and polity," 426 U.S. at 698, 96 S.Ct. at 2375, resulted in "an impermissible rejection of the decisions of the highest ecclesiastical tribunals of [that] * * * hierarchical church" on the issue of the de-

frockment proceedings of a Serbian Orthodox bishop. *Id.* at 708, 96 S.Ct. at 2380. The disposition of the property controlled by the one holding the office of Bishop was incidental to the ecclesiastical determination of who held that office. *Id.* at 720, 96 S.Ct. at 2385.

This case is analogous to *Serbian,* but without the constitutionally invalid inquiry into religious and ecclesiastical beliefs and procedures in which the Illinois Supreme Court engaged. Here there is no issue with respect to the deposition of the Rector. It is conceded that he does not hold his former office. Here, as in *Serbian,* and as reaffirmed in *Jones* v. *Wolf,* the right to possession of the parish property incidental to that office follows.[10]

Accordingly, the deference to the Bishop's deposition of the petitioner Burns results from no inquiry into the religious or ecclesiastical sources of the Bishop's power to do so. The deposition has never been contested and the Wardens and Vestrymen voluntarily disaffiliated themselves from the Church.

Indeed, the petitioners themselves have recognized and acceded to the principle of deference to ecclesiastical hierarchical authority. This case arose because the petitioners would not accept certain resolutions of the General Conven-

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[10] This is entirely consistent with this Court's holding that freedom to select clergy has "federal constitutional protection as a part of the free exercise of religion against state interference". *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America,* 344 U.S. 94, 116, 73 S.Ct. 143, 154 (1954). See also, *Presbyterian Ch.* v. *Mary E. B. Hull Mem. Pres. Ch.,* 393 U.S. 440, 447, 89 S.Ct. 601, 605 (1969); *Gonzales* v. *Archbishop,* 280 U.S. 1, 16-17, 50 S.Ct. 5, 7-8, (1929).

tion. They desired to withdraw and embrace the doctrine and organization of another church. Had the petitioners themselves not recognized the hierarchical structure of the Church, it is a fair inference that resolutions of its highest council would not have compelled their withdrawal.

(c) *Timeliness.* *Jones* v. *Wolf* was decided July 2, 1979, less than two years ago. It reaffirms constitutional principles previously expounded by this Court and delineates their application in certain specific types of situations. It has generated comment, see, e.g., Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment,* 128 U.PA.L.REV. 1291 (1980); Comment, *Church Property Disputes: The Trend and the Alternative,* 31 MERCER L. REV. 559 (1980); Comment, *Constitutional Law: Neutral Principles of Law and Majority Rule Presumption Applied in Disputes Over Church Property* 19 WASHBURN L.J. 590 (1980); Note, *A State May Constitutionally Adopt a Neutral Principles of Law Approach for Adjudicating Church Property Disputes,* 48 CIN. L. REV. 1108 (1979); Note, *Constitutional Guidelines for Civil Court Resolution of Property Disputes Arising from Religious Schism,* 45 Mo. L. REV. 518 (1980), and its principles will be applied and examined in various lower court cases throughout the nation. At some time in the future it may be appropriate for this Court to provide additional constitutional guidelines for the resolution of church property disputes. This case is neither an appropriate vehicle for such further elaboration, nor would it be timely. Decisions of this Court frequently take years of application before unique factual situations render further consideration and decision appropriate or desirable. Yet another Supreme Court decision, following within two years of the last one, could well engender uncertainty which will be avoided by the practical application and interpreta-

tion of *Jones* v. *Wolf*.[11] Moreover, the inquiry urged by the petitioners would create chaos in a field which, by deliberate judicial process, is approaching a desirable degree of order.[12]

The decisions below were in accordance with state law representing a means of disposition of church property expressly sanctioned by this Court. The decisions of the courts below are consistent with other lower court decisions dealing with similar subject matter. The principles of *Jones* v. *Wolf* should be given an opportunity to work out in practice. In short, the orderly evolution of the law in this area would not be served by review of this case. Accordingly, the petition should be denied.

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[11] "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918, 70 S.Ct. 252, 255 (1950) (Frankfurter, J. Opinion respecting denial of the petition for writ of *certiorari*).

[12] Every case throughout the country which has come to the attention of the plaintiffs has held the Episcopal Church to be hierarchical. See *Protestant Episcopal Church* v. *The Reverend John D. Barker*, and three cases consolidated therewith (Sup. Ct., Calif., L.A. No. C 188, 907); *Bishop and Diocese of Colorado* v. *Montell*, (Denver Dist. Ct., Nov. 29, 1979); *Duncan* v. *Watterson*, 55 Fla. Supp. 49 (Circuit Ct., Palm Beach Co. 1979); *Diocese of Southwestern Va.* v. *Buhrman*, No. 1748 (Circuit Ct. of Clifton Forge, November 28, 1977); *Diocese of Southwestern Va.* v. *Wyckoff*, Chancery No. 3748 (Circuit Ct. of Amherst Co., November 16, 1979); *Protestant Episcopal Church* v. *Lesser*, Sup. Ct. Calif., Alameda Cty., No. H-55572-2 (Feb. 25, 1980). Most of these cases involved precisely the same issues as this case, brought by other Dioceses of the same Church, against similarly situated defendants who renounced their affiliation with the Episcopal Church. *Cf. St. John's Presbytery* v. *Central Presbyterian Church of St. Petersburg*, 102 So.2d 714 (Fla. 1958)

CONCLUSION

For all of the foregoing reasons the petition should be denied.

Respectfully submitted,

EUGENE M. HARING,
McCARTER & ENGLISH,
Counsel for Respondents.

APPENDIX A

Opinion of the Superior Court of New Jersey, Chancery Division, Granting Preliminary Relief to Plaintiffs, dated September 6, 1978

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY COURTS BLDG.
NEWARK, N. J. 07102

Chambers of
ARTHUR C. DWYER
Judge

Chancery Division

[SEAL]

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Re: The Diocese of Newark, et al
v. William F. Burns, et al
Docket No. C-4164-77

Dear Sirs:

The Diocese of Newark, a corporation organized under the Religious Corporation Act of New Jersey ("Diocese"),

Appendix A

The Trustees of the Episcopal Fund and Diocesan Properties of the Diocese of Newark, a corporation organized under the Religious Corporation Act of New Jersey ("Trustees") and The Right Reverend George E. Rath ("Bishop Rath") by complaint, supporting affidavits and order to show cause initiated action against William F. Burns, individually, and The Rector, Warden and Vestrymen of St. Mark's Church in Orange, a corporation organized under the Religious Corporation Act of New Jersey ("St. Marks"): (i) to have determined that all the real, personal and equitable rights to property owned or held by St. Marks prior to October 16, 1977 is impressed with an irrevocable trust in favor of Diocese and the Protestant Episcopal Church in the United States of America; (ii) to have declared that St. Marks is without corporate officers because its present officers are not adherents of the Protestant Episcopal Church; (iii) to restrain defendants from interfering with the use of the properties of St. Marks as may be directed by the Diocese and the Bishop; (iv) to have an order of possession issue directing that William Burns be removed from the Rectory; and (v) to restrain the defendants from using or withdrawing the financial or other assets of St. Marks.

The factual issues as posed by the complaint, answer, counterclaim, and answer thereto are narrow in contrast to the legal issues purportedly tendered by the defendants.

Since the original return date of the order to show cause, the court has received supplemental affidavits and briefs as well as certain exhibits marked in evidence without objection. The court is basing this decision on the pleadings and all the material now before it.

Appendix A

Plaintiffs allege that the Protestant Episcopal Church in the United States of America is and has been organized on a hierarchical basis. Diocese is the result of the division of what was the Diocese of New Jersey into several dioceses. The corporate entity herein called Trustees is a corporation authorized to hold properties of the Diocese and trust funds of those associated with the Diocese. They further allege that Bishop Rath has the powers given to a bishop under the Canons of the Protestant Episcopal Church in the United States of America and the Diocese. Except as to the allegation that the relation to St. Marks in temporal matters is that of a hierarchical church, defendants do not deny these allegations. The court has been furnished copies of the certificates of incorporation of the corporate plaintiffs.

There is no dispute that St. Marks was originally incorporated under the Religious Corporation Act of 1799 in April 1827. The certificate filed with the Clerk of Essex County on April 20, 1827 to reflect said incorporation recites in relevant part:

> "* * * a congregation of christians of the Protestant Episcopal Church * * *"
>
> "* * * do hereby take and assume as ourselves the name 'The Wardens and Vestry of St. Marks Church in Orange, New Jersey' * * *"

Similarly, there is no dispute that on July 9, 1832, a certificate was filed with the Clerk of Essex County that recited in relevant part:

> "* * * that this church embrace the privileges of the act, entitled 'An Act to incorporate religious Societies, worshipping according to the customs and

> usages of the Protestant Episcopal church passed Feb. 17, 1829.' "

the name was stated as:

> "The Rector, Wardens and Vestrymen of St. Marks Church in Orange, New Jersey."

The records of the Annual Conventions of the Diocese of New Jersey and Diocese show that St. Marks sent delegates to the Annual Convention in 1827 and was accepted into the Annual Convention. Counsel have stipulated that until sometime in 1977, St. Marks regularly sent delegates to and participated in the Annual Convention of the Diocese. The Annual Convention is in a sense the governing body of the Diocese.

William F. Burns (Rev. Burns) was ordained a Presbyter of the Protestant Episcopal Church on May 30, 1963, by the Right Reverend Leland Stark, the Bishop of the Diocese of Newark. On October 1, 1966, Rev. Burns was elected Rector of St. Marks Church.

Defendants allege that there were duly called meetings of the Vestry and Parish of St. Marks and St. Marks Church respectively. At the meeting of the Rector, Vestrymen and Wardens on June 28, 1977 there was a vote of 12-1 with two absent to request the return of approximately $192,000 of funds held by the Trustees to the Treasurer of St. Marks with the stipulation that those funds be used for the sole purpose of the parish of St. Marks. At the meeting of the parish held on July 10, 1977 the Parish in congregation voted 45-5 to withdraw from the Diocese and the Protestant Episcopal Church in the United States of America. These events were communicated to the Bishop by Rev. Burns on July 11, 1977.

Appendix A

Since this court is not concerned with matters of faith between different groups within a religious organization there is no need to set forth the bases for the differences other than to state that they deal with matters of religious doctrine.

On October 16, 1977, the Parish in congregation adopted a resolution unanimously by all present. It is not established that these included all in the congregation.

> "RESOLVED THAT St. Mark's Church terminate its affiliation with the Protestant Episcopal Church of the United States of America and the Episcopal Diocese of Newark; and
>
> * * *
>
> "FURTHER RESOLVED, that the rector, wardens and vestrymen be and, they hereby are, authorized to take all steps as shall be reasonably appropriate and necessary to effectuate the foregoing resolutions and to obtain the return of all property owned by this church presently in the possession or custody of the Episcopal Diocese of Newark or any other corporation or entity affiliated with it."

During the period outlined above, Bishop Rath advised by letter of July 28, 1977 that the separation of the parish from the Diocese was contrary to Canon I. 12. 1.[1] Bishop Rath also inhibited Rev. Burns from officiating in the Diocese of Newark for six months from October 17, 1977 and advised him of his rights under the Canons.

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[1] Canon I. 12. 1 states:

> Every Congregation of this Church shall belong to the Church in the Diocese in which its place of worship is situated * * *

Appendix A

On June 19, 1978 pursuant to the procedures outlined in the Canons, the Sentence of Deposition was imposed on Rev. Burns. Bishop Rath appointed Archdeacon Grant as the Priest in charge of St. Marks Church for purposes of officiating at services. Archdeacon Grant was denied the right to conduct religious services at St. Marks Church.

Immediately following the denial of access to Archdeacon Grant, plaintiffs commenced this action.

Defendants have alleged that St. Marks must be regarded as a congregational church within the meaning of *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1871), and that the congregation by reason of the vote taken has a right to retain all the property of St. Marks.

Defendants also assert that the court lacks jurisdiction over this action under the First and Fourteenth Amendments to the Constitution of the United States of America and Paragraphs Three and Four of Article I of the Constitution of The State of New Jersey.

Defendants further assert that the sections of the Religious Corporation Act relied upon by the plaintiffs violate the same constitutional provisions referred to above if applied to St. Marks as well as Article I, §10 of the Constitution of the United States of America prohibiting states from passing laws impairing contracts.

By counterclaim defendants seek to retain or recover the property of St. Marks.

The supplemental proofs and affidavits show that there are a number of trust instruments created under wills or gifts of individuals with language that is unique to each instrument. The court wil not deal with all of those in this opinion.

Appendix A

The court will consider the jurisdictional defense first, the applicability of the various provisions of the Religious Corporation Act next, and finally the title question and the question of appropriate relief.

Under the decisions of the U.S. Supreme Court in *Presbyterian Church* v. *Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658 (1969) Md. & Va. and *Eldership of the Churches of God* v. *Church of God at Sharpsburg,* 396 U.S. 367, 90 S.Ct. 499, 24 L. Ed. 2d 582 (1970) and the decision in *St. John's Greek Catholic Church* v. *Fedak,* 96 N.J. Super. 556 (App. Div.), *certif. denied,* 50 N.J. 406 (1967), and cases cited therein, the court holds that it has jurisdiction to determine the rights to the real, personal and equitable property of St. Marks here in dispute.

The court recognizes that the guidelines set forth in the decisions of the United States Supreme Court cited above govern its decision. However, the court reads the decision in *Presbyterian Church* v. *Hull Memorial Presbyterian Church, supra,* as not only making the guidelines therein a matter of constitutional law but also as recognizing that the guidelines of *Watson* v. *Jones, supra,* are still valid. What the United States Supreme Court held was that civil courts cannot determine whether one religious group or another has departed from religious doctrine espoused by both in the past to determine property rights without undertaking to determine the religious rights of one or the other in violation of the First Amendment; hence the civil courts must utilize "neutral principles". Principles that courts normally utilize in determining title to property questions.

Appendix A

There is no need to resolve the rightness of anyone's religious beliefs to resolve the title to the property here in question.

Defendants contend that plaintiffs ground their right to relief upon a number of provisions in the Religious Corporation Act that either are not applicable to it, or if applicable to it are necessarily unconstitutional because they violate the provision of the Federal Constitution prohibiting states from passing any laws that impair contract rights. Art. I, §10 of the United States Constitution. Finally urge that if they do not prevail on the foregoing arguments, they contend that any provision of the Religious Corporation Act that applies especially to one religion and not all religions is invalid under the First Amendment and Art. I, Par. 3 and 4 of the Constitution of New Jersey.

The defendants contend that St. Marks was incorporated under the Religious Corporation Act of 1799. It accepted the provisions of the Act of 1829. At that time, however, the Legislature had not reserved the power to alter, repeal or amend charters granted to religious corporations. Until 1875, the Constitution of New Jersey did not give that power to the Legislature. The defendants urge that any interference with the rights granted to St. Marks under the Act of 1799 by subsequent acts of the Legislature are invalid under the decisions in *Trustees of Dartmouth College* v. *Woodward,* 174 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819) and *Zabriskie* v. *Hackensack & N.Y. R.R.,* 18 N.J. Eq. 178 (Ch. 1867), overruled *Brundage* v. *New Jersey Zinc Co.,* 48 N.J. 450, 469 (1967).

The Act of 1799 provided in relevant part:

> "1. Be it Enacted by the Council and General Assembly of this State, and it is hereby enacted by

the authority of the same, That every religious society or congregation of Christians, entitled to protection in the free exercise of their religion, by the constitution and laws of this State, are hereby authorized to assemble at their usual place of meeting for public worship, at any time by them to be agreed upon, giving at least ten days notice of the time and purpose of assembling, by an advertisement set up in open view at or near such place of meeting, and, when so assembled, may, by plurality of voices of such of the said society or congregation as are present, elect any number not exceeding seven, of the said society or congregation, to be trustees of the same; which said trustees and their successors in office are hereby constituted a body politic and corporate in law, by whatever name they shall assume, agreeably to the directions of this act.

* * *

"III. And be it Enacted, That the said trustees and their successors shall, by such name of incorporation, be able and capable to acquire, purchase, receive, have and hold any lands, tenements, hereditaments, legacies, donations, monies, goods and chattels, in trust for the use of the said society or congregation, to an amount in value not exceeding two thousand dollars a year, and the same or any part thereof to sell, grant, assign, demise, alien and dispose of; to sue or be sued, implead or be impleaded, in any court of law or equity * * *"

VI. This section provided for the election of a president of the corporation from the congregation.

IX. This section provided that the acts and orders of a majority of the members of the corporation shall be valid and effectual at law.

The full text of the Act of February 17, 1829 is annexed hereto. The relevant sections are repeated here.

> Sec. 3. And be it enacted, That the rector, wardens, and vestrymen, appointed as aforesaid, shall be a body corporate and politic, in law and in fact, to have continuance for ever, under the same restrictions, and with the same rights and privileges, as are expressed in the 'Act to incorporate trustees of religious societies,' passed the twelfth day of June, one thousand seven hundred and ninety-nine: *Provided nevertheless,* that if at any time the church be without a minister or rector, the same rights and privileges shall be vested in the wardens and vestrymen.
>
> "Sec. 4. And be it Enacted, That the rector, wardens, and vestrymen, and their successors, or a majority of them, may make such rules, by-laws, and ordinances, and do every thing needful and requisite for the good government and support of the church; all of which shall be entered in a book to be provided and kept for that purpose: *Provided,* that the said rules, by-laws, and ordinances shall not be repugnant to the constitution and laws of this state or of the United States.
>
> "Sec. 5. And be it Enacted, That the qualification of voters at the annual elections shall be conformable to the constitution and principles of the Protestant Episcopal Church in New Jersey.

* * *

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"Sec. 7. And be it Enacted, That when a vacancy shall occur in the office of minister or rector, by death, removal or otherwise, the said wardens and vestrymen (two-thirds of them concurring in the choice) may choose some fit person, duly qualified, to act as minister or rector of said church, agreeably to the constitution of the Protestant Episcopal Church in the United States of America; and the minister or rector so chosen shall preside at all meetings of the wardens and vestrymen, and have a casting vote, except the business or question to be decided has relation to personal interest of said minister or rector: *Provided,* that, in the absence of the president, the wardens and vestrymen may choose a president pro tempore.

"Sec. 7. And be it Enacted, That it shall and may be lawful for any Protestant Episcopal Church in this state, incorporated under existing laws, to embrace the privileges of this act, by compliance with, and adopting its provisions."

As stated above St. Marks adopted these provisions in 1832.

Of historical interest, the above quoted law together with other sections pertaining to the Protestant Episcopal Church were placed in §§27 to 38 of the Revision of 1875 as it appears in the Revised Statutes of 1877.

Chapter L VI of P.L. 1877 supplemented Section 31 of the Revision 1875 pertaining to the right of Protestant Episcopal Churches to hold property. A copy thereof is annexed hereto.

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The court has made the historical notes above to explain that the procedures under which St. Marks claims the right to act are now found in N.J.S.A. 16:12-1 *et seq.* and not under the general provisions of N.J.S.A. 16:1-1 *et seq.* For reasons hereinafter stated, it is not necessary to determine whether any provisions to which St. Marks has not historically consented to is applicable to it in order to decide this case.[2]

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[2] In its original application for relief plaintiffs referred to N.J. S.A. 16:1-25 which provides:

> "No rector, wardens or vestrymen, or trustees, consistory or session of any incorporated church, congregation or religious society of this state shall divert the estate, property or revenue belonging thereto to any purpose other than the support and maintenance of the church or religious or benevolent institution or object connected with the church or denomination to which the corporation belongs. The highest judicatory of any denomination from which property is attempted to be diverted in violation hereof, may enforce this provision, but nothing herein contained shall prevent action being taken by members of the congregation or otherwise to enforce such provision."

and N.J.S.A. 16:12-4 which provides:

> "No sale, conveyance or mortgage of any real estate other than burial lots in churchyards or cemeteries, and no lease for a longer term than one year shall be made by such corporation without the previous written consent of the bishop and a majority of the standing committee of the diocese within which the corporation is located, or in case of a vacancy in the office of bishop, or of his absence from the diocese, then of a majority of the standing committee. Such consent shall be acknowledged or

(Footnote continued on following page)

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(Footnote continued from preceding page)

> proved and recorded with the deed, lease, mortgage or instrument of conveyance. Without such consent the sale, conveyance, mortgage or lease shall be void."

Although the 1961 amendment to the certificate of incorporation of St. Marks recites it was made pursuant to N.J.S.A. 16:12-14, defendants contend that those statutes are not applicable to it because they were enacted after St. Marks was incorporated. In their brief they state that in response to a decision of an Illinois court that held a church seceding from the Protestant Episcopal Church could retain the property utilized by that seceding church the General Convention of the Protestant Episcopal Church in the United States of America adopted a resolution. The resolution purportedly recommended that the various dioceses try to have enacted legislation similar to that found in N.J.S.A. 16:12-4. The defendants conclude therefore that it is not applicable to St. Marks. *Cf. Burke* v. *Rector, Wardens and Vestrymen of Trinity Church,* 63 N.Y. Misc. 43, 117 N.Y.S. 255 aff'd. 132 App.Div. 930, 117 N.Y.S. 1130 (1909).

Defendants made no comment about Canon 1.6 Sec. 3 of the Protestant Episcopal Church in the United States of America which states:

> No Vestry, Trustee or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish Congregation or Institution shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.

Article VIII of the present Constitution of the Diocese states in respect to admission of new parishes:

(Footnote continued on following page)

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In *Morgan* v. *Rose*, 22 N.J. Eq. 583 (E. & A. 1871), Chief Justice Beasley had occasion to construe the third section of the Act of 1799 quoted above. He said:

> "The language here used is altogether certain and unambiguous. The legislative intent is plainly stated. The provision is, in substance, this: the temporalities of the church are put in trust, without limitations, for the use of the congregation. This being the clear intent, the only inquiry is to the legal effect of such a disposition of property. [*Id.* at 586]
>
> "It was not the legislative design to establish one uniform government over the temporalities of each

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(Footnote continued from preceding page)

A new Parish may be admitted into union with this Convention by a majority of votes provided it shall have submitted:

(4) An authenticated copy of a resolution of its incorporators, Wardens and Vestrymen promising conformity and obedience to the Doctrine, Discipline and Worship of the Protestant Episcopal Church in the United States of America and to the Constitution and Canons of that Church and the Diocese.

Defendants have suggested that those provisions did not exist when St. Marks joined the Convention and therefore are not binding on it. Since St. Marks was a voting member of the Convention when these provisions were adopted, the argument is analogous to a State arguing the amendment imposing the income tax is not applicable to its citizens because such a provision was not in the Constitution when it joined the United States of America. The argument ignores the power of the Protestant Episcopal Church to amend its constitution and the power to amend the Constitution found in the Constitution.

church that became incorporated under its provisions, but simply to provide flexible machinery, whereby each congregation could hold, protect, and dispose of its property in such manner, and for such purposes as might seem to it best. I have no idea that the framers of this act intended that each society of christians who availed themselves of its privileges, gave up, by such act, to the trustees thus selected, all dominion over their property, real and personal; but, on the contrary, I deem the purpose was, and such purpose seems to me a most wise one, to put it in the power of every such society to transmit its property in perpetual succession, by investing it with the requisite corporate capacities, leaving it to be disposed of, through this instrumentality, by either the whole congregation, or certain parts of it, or by such of its functionaries as should be clothed with such power by force of the ecclesiastical organization to which they might belong. I think, therefore, these trustees, as the holders of a simple trust, have no right, in equity, to control or dispose of the church property except as directed so to do by the *cestui que trust.* Whether the power to give such direction resides in the whole congregation, or in particular members, or in special officials, depends, in each instance, on the established usages or express regulations of the individual congregation, or of that wider ecclesiastical organization of which such congregation is a branch. But, as has been already stated, the whole effect of this statute is to create a general trust, making the trustees bare depositaries of the legal estate in the temporalities." [*Id.* at 587-588]

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In the interests of brevity the court cited the above case, not only because of its respect for Chief Justice Beasley, but also for his analysis of the cases involving the Dutch Reformed Church where the courts upheld the power of the hierarical church and the suggestion that the same principle applied under section three of the Act.

In *Den* v. *Bolton,* 12 N.J.L. 236 (S.Ct. 1830), it is said:

> "The consistory of the English Neighborhood could not get clear of the decision of the classis of Bergen, by changing their allegiance, but by appealing to the next superior judicatory. By an appeal and by that alone, the effect of the decision of the classis could have been suspended. They refuse to appeal, and deny the government with which they acknowledge themselves to have been connected. In my opinion, the decision of the classis must stand, and the election be held valid.
>
> "I consider this question, as now presented to this court, to be a mere dispute respecting the possession and guardianship of a trust property. It is not necessary to decide upon even the interests of the defendant, as *cestui que trusts,* and much less, as to any spiritual matters controverted between the parties. The defendants obtained the right to office, and the custody of the temporalities of a church by connecting themselves with it, and by submitting to its government. If they have become tired of the church, or its government, they certainly may exercise the right of withdrawing from it; but they cannot reasonably expect to carry

> off its offices, and its property, with them. The same judicatories, which invested them with office have, not merely upon general principles, but by express legislative enactment, a right to decide upon the tenure of those offices, and the effect of their decision cannot be evaded by a disclaimer of their jurisdiction." [*Id.* at 275-276]

In *Presbytery of Jersey City* v. *First Presbyterian Church,* 80 N.J.L. 572 (S. Ct. 1910) many of the constitutional arguments advanced were also advanced and rejected. The court does not set them forth but adopts the reasoning of that court. That court said in construing rights under section three of the Act of 1799.

> "If, in the case at bar, it is shown—*first,* that the original *cestuis que trustent* are extinct, and *second,* that the denomination as a whole, as represented by the Presbytery of Jersey City are next entitled as beneficiaries, it must follow that the Presbytery is in a like position as would have been the congregation, with respect to its right to come into equity.
>
> "Now the original beneficiaries, the congregation of the Weehawken Presbyterian Church, are extinct. A local congregation is never independent, but *ab initio* an integral part of the denomination; this is the implied condition of its existence, and binds all its members. *Fair* v. *First Methodist Episcopal Church,* 12 Dick. Ch. Rep., 496, 501; *Everett* v. *First Presbyterian Church,* 8 Id. 500; *American Primitive Society* v. *Pilling,* 4 Zab. 653. While properly affiliated with the denominational body, the congregation can act with a certain degree of independence, but

they can never use the property in such a way as to amount to a use not denominational in character; that is, to a use other than that sanctioned by the denomination to which such congregation belongs. *American Primitive Society* v. *Pilling, supra.* For instance, they cannot secede and take their property with them, even if they do so unanimously. *American Primitive Society* v. *Pilings, supra; Baker* v. *Fales,* 16 Mass. 488. Whenever a local church and congregation becomes extinct, the Presbytery can and does strike it from the roll of churches, and dissolves it. It seems to be admitted in this case that the dissolution of the Weehawken church and congregation was proper, and that it was therefore in accordance with the ecclesiastical and civil law, and bound the congregation, if any members remained, by reason of their membership. *Day* v. *Bolton,* 7 Halst. 206. The dissolution by the Presbytery therefore terminated the membership of all persons in the congregation, rendering it extinct as a body. *Gaff* v. *Greer,* 88 Ind. 122. This act of dissolution, resulting in disfranchisement, is the conclusion or act of an ecclesiastical judicatory and legislative body, and not being in conflict with civil law, is valid and binding. 34 Cyc. 1185.

"The following considerations show the disfranchisement to be not in conflict with the civil law:

(a) Under the statute of 1799 (*Pat.L.,* p. 412), and before the Religious Society act of 1875 (*Gen. Stat.,* p. 2735), and the act relating to Presbyterian churches (*Pamph.L.* 1905, p. 250), which two latter statutes prescribe certain membership qualifications,

denominational rules governed. *American Primitive Society* v. *Pilling, supra.*

(b) The statutes of 1875 and 1905 being in derogation of the common law must be strictly construed.

(c) Therefore, the fact that these statutes prescribe certain rules for membership in congregations, in the absence of an express or implied provision therein limiting the right of the denomination, as at common law, to prescribe further rules, preserves this right to the denomination.

(d) Consequently, when all ecclesiastical relation is cut off by the dissolution of the church, all membership in the congregation must necessarily cease. The Presbytery's action has severed the connection between the denomination and the church, the continued existence of which was a condition of the beneficial enjoyment of the property by the congregation. The congregation are beneficiaries *only so long as they remain connected with the denomination,* and their dissolution has struck them off as direct beneficiaries.

(e) The Presbytery's power and authority to extinguish membership has never been questioned. It has authority to organize congregations, to confer membership, to alter relations, and its authority to dissolve membership follows as a necessary and proper one. *Baker* v. *Fales, supra.*

"It being clear, then, that the congregation is now extinct, it remains only to consider whether the

Presbytery of Jersey City is the beneficiary. We are of opinion that it is.

"We are not now concerned with the possible rights of donors, or their heirs, this question being excluded by the state of facts.

"The statute being silent on the subject of donor's rights, the implication is that the title revests subject to such rights. In case of the dissolution of a society there is no reverter, but the doctrine of *cy pres* is invoked. 6 *Cyc.* 977.

"We have before us, then, this situation: trustees without interest, beneficial title in abeyance, and rights of donors not involved. How might this situation be remedied without reference to the statute in question? Only by a proper application to the Chancellor, who, by virtue of the decision in the case of *MacKenzie* v. *Trustees of Presbytery of Jersey City,* 1 Robb. 652, has as ample powers under the doctrine of *cy pres* as the High Court of Chancery in England. Such a bill could be filed by a person in interest only. No one of the original members of the congregation could file it as such, since that is extinct. But the beneficial title cannot remain in abeyance. Some persons must be the beneficiaries, and equity on application of such class of persons would confer the beneficial title upon them. These are no other than a class, not yet created, but which the Presbytery has a perfect right to create by virtue of its general jurisdiction to create, alter and dissolve church congregations, and by virtue of the qualified right of property in the denomination

at large. Such a class must consist of members of the denomination, since the property can be used only for denominational purposes.

"In the case at bar the church trustees have held for the benefit of the congregation upon an implied trust that the ecclesiastical relationship shall not be altered, and that in the event of the dissolution of the church body, then for the benefit of a class to be chosen by the denomination at large. *Baker* v. *Fales, supra.* After the dissolution of the congregation, if the trustees refuse to convey the property to the Presbytery, they are necessarily using it for a purpose not sanctioned by the denomination, or not using it at all, which amounts to a diversion. No doubt the act of March 25th, 1881 (*Pamph. L.*, p. 256), was designed to remedy such a situation, but is inadequate for that purpose.

"We are therefore of opinion that the facts of the case at bar bring it within the rule laid down in the case of the Garden Street Church, and that the act of April 16th, 1908, is not unconstitutional as taking property without due process of law, nor as divesting vested rights, nor as being retrospective."

It then granted relief to the Presbytery, the representative of the denomination.

Defendants next assert that if the court determines that St. Marks was associated with the Diocese and Diocese was a hierarchical church, the court must next inquire and find that St. Marks in its temporal affairs was part

of a hierarchical church. Defendants cite *Md. & Va. Eldership of the Churches of God, et al* v. *The Church of God at Sharpsburg, Inc., et al.,* 249 Md. 650, 241 A. 2d 691 (Ct. of A. 1968), 254 Md. 162, 254 A. 2d 162 (1969) app. dism. 396 U.S. 367, 24 L.Ed. 2d 582, 90 S.Ct. 499 (1970) and *St. John's Greek Catholic Church* v. *Fedak, supra.* If the court, after inquiry, finds St. Marks is a congregational church, then it must allow the congregation of St. Marks to retain control over the property and not the Diocese.

In *Fedak,* the Appellate Division reversed the decision of the trial court reported in 89 N.J. Super. 65 (Ch. 1965). The Appellate Division agreed with the trial court that in the absence of a formal acceptance by St. John's of association with the North American Metropolia resort to a factual inquiry was appropriate. The Appellate Division pointed out that St. John's was incorporated under the general provisions of the Religious Corporation Act; *i.e.,* those found in N.J.S.A. 16:1-1 *et seq.* The Appellate Division disagreed with the trial court's findings of fact as to the relationship of St. John's and the North America Metropolia. It pointed out that during the period after 1917 there had been parallel authority for the validity of the person serving as the Metropolitan of the North America Metropolia. It pointed to acts of independence and the provisions of N.J.S.A. 16:1-4.

In the case *sub judice,* the court notes St. Marks in 1832 accepted the provisions of an act intended for the benefit of churches associated with the Protestant Episcopal Church. St. Marks formally joined the Annual Convention in 1827 within a month after its incorporation. As

stated earlier counsel have stipulated that for one hundred and fifty years St. Marks participated in the Annual Convention.

It has acted formally under N.J.S.A. 16:12-4 to amend its certificate of incorporation. This action may have been dictated by the provision found in N.J.S.A. 16:1-18 which makes that section inapplicable to Protestant Episcopal churches and hence its significance evaluated at a later time.

The court has not been able to read the deeds to the real property owned by St. Marks. The court understands from counsel that there is no express gift over in favor of the Diocese, its predecessor, or the Protestant Episcopal church.

A title examiner looking at the records, the statutes of 1799 and 1829 referred to herein, the Constitution and Canons of the Protestant Episcopal church, and the decisions cited herein would conclude that the Bishop of the Diocese would have to consent to an alienation by St. Marks of its real property. As the record now stands, this court reaches the same result.

In *Everett* v. *First Presbyterian Church,* 53 N.J.Eq. 500 (Ch. 1895), Vice Chancellor Pitney outlined the difference in interests in a church edifice and a rectory. In that case, the court concluded that the minister who occupied the rectory had a contract to do so and denied the complainants right to oust him. See also comments of Judge Mintz distinguishing the case in 89 N.J. Super. at p. 76.

On the record now before it, this court concludes (i) that St. Marks was part of a hierarchial church of which the Diocese was the next highest unit and the Protestant Episcopal Church in the United States of America the

next highest; (ii) that the proper ecclesiastical authorities deposed Rev. Burns; that the resolution of those members of the congregation voting for it had the effect of severing their relationship with the Diocese and higher authority and the Diocese has so considered it; and that similarly the action of the vestrymen in voting to withdraw severed their relationship with the Diocese and higher authority.

The court further concludes that under the decision in *Presbytery of Jersey City* v. *First Presbyterian Church, supra, Kelly* v. *McIntire,* 123 N.J.Eq. 351 (Ch. 1943) and *The Protestant Episcopal Church in the Diocese of New Jersey, et al.* v. *Rev. Stanwood E. Graves, et al.,* —— (Ch. Div. 1978) app. for pub., the Diocese has the right to the use of the church and Bishop Rath the right to designate the person to officiate at services.

Careful review of the cases cited herein suggest that there are questions which will have to be resolved which have not been raised and which may require the addition of parties not now present. They are

> What is the present status of the corporate officers?
>
> What is the present status of the wardens and vestrymen? Can such status be determined without them being parties?
>
> Are there any members of St. Marks who wish to assert individual rights to use of the church contrary to that expressed by the majority?
>
> If the defendants want to press their attack on the portion of the Religious Corporation Act applicable to Protestant Episcopal churches on constitutional grounds, should not the Attorney General be made a party?

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The court will grant preliminary restraints except Rev. Burns may remain in the Rectory until further order of the court.

Defendants shall advise the court that either they are dropping the constitutional question last stated or notify the Attorney General of the suit within two weeks of the date of this decision.

Very truly yours,

ARTHUR C. DWYER, J.S.C.

ACD:ras
Enc.

Appendix A

Act of February 17, 1829

This copy made from Acts of the fifty-third General Assembly, second sitting.

AN ACT to incorporate religious societies worshipping according to the customs and usages of the Protestant Episcopal Church.

Preamble.

WHEREAS the act entitled, "An act to incorporate trustees of religious societies," passed the twelfth day of June, one thousand seven hundred and ninety-nine, is, in some respects, inconsistent with the constitution, usages and customs of the Protestant Episcopal Church in this state.—AND WHEREAS the convention of said church have prayed the aid of the legislature in the premises—Therefore,

Certain privileges granted to the Episcopal Church.

SEC. 1. BE IT ENACTED *by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That when any congregation of the Protestant Episcopal Church in this state, duly organized according to the constitution and usages of said church, desire to form themselves into a body corporate, notice shall be given of such intention ten days previously, by an advertisement set up in open view at or near the place where such congregation usually assemble for divine service, designating the day when, and the place where, they design to meet for that purpose.

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Who to preside at meetings convened to designate the corporate name of any new church.

SEC. 2. *And be it enacted,* That the congregation, having met at the time and place appointed, the rector or minister, or if there be no rector or minister, or he be necessarily absent, one of the church wardens or vestrymen shall preside at the meeting, and the secretary of the vestry shall record the proceedings of the meeting. The congregation shall then proceed, by a vote of the majority of those present, to designate the corporate name or title by which the church shall be known, which shall be in the manner and form as follows: "the Rector, Wardens, and Vestrymen of Church in ."

The congregation shall then choose two wardens, and not more than ten, nor less than five vestrymen, and also fix and determine the day, annually, on which new elections of officers shall take place. A certificate of these proceedings, under the hands and seals of the president and secretary of the meeting, shall be transmitted to the clerk of the Court of Common Pleas of the county, whose duty it shall be to record the same, for which he shall be entitled to receive the usual compensation for similar sevice.

To be a body corporate and politic.

SEC. 3. *And be it enacted,* That the rector, wardens, and vestrymen, appointed as aforesaid, shall be a body corporate and politic, in law and in fact, to have continuance for ever, under the same restrictions, and with the same rights and privileges, as

are expressed in the "Act to incorporate trustees of religious societies," passed the twelfth day of June, one thousand seven hundred and ninety-nine: *Provided nevertheless,* that if at any time the church be without a minster or rector, the same rights and privileges shall be vested in the wardens and vestrymen.

Empowered to make by-laws &c.

SEC. 4. *And be it enacted,* That the rector, wardens, and vestrymen, and their successors, or a majority of them, may make such rules, by-laws, and ordinances, and do every thing needful and requisite for the good government and support of the church; all of which shall be entered in a book to be provided and kept for that purpose: *Provided,* that the said rules, by-laws, and ordinances shall not be repugnant to the constitution and laws of this state or of the United States.

Qualifications of voters, &c.

SEC. 5. *And be it enacted,* That the qualification of voters at the annual elections shall be conformable to the constitution and principles of the Protestant Episcopal Church in New Jersey.

A treasurer to be chosen; his duty, &c.

SEC. 6. *And be it enacted,* That the rector, wardens, and vestrymen shall choose a treasurer, who, when called upon for that purpose, shall render a

true and just account to the corporation, of all moneys by him received and expended, and pay over the balance which may remain in his hands at the time of settlement, to his successor in office.

Wardens and vestrymen authorized, under certain contingencies, to choose a minister &c.

SEC. 7. *And be it enacted,* That when a vacancy shall occur in the office of minister or rector, by death, removal, or otherwise, the said wardens and vestrymen (two-thirds of them concurring in the choice) may choose some fit person, duly qualified, to act as minister or rector of said church, agreeably to the constitution of the Protestant Episcopal Church in the United States of America; and the minister or rector so chosen shall preside at all meetings of the wardens and vestrymen, and have a casting vote, except the business or question to be decided has relation to personal interest of said minister or rector: *Provided,* that, in the absence of the president, the wardens and vestrymen may choose a president pro tempore.

Who may embrace the privileges of this act.

SEC. 7. *And be it enacted,* That it shall and may be lawful for any Protestant Episcopal Church in this state, incorporated under existing laws, to embrace the privileges of this act, by compliance with, and adopting its provisions.

C. February 17, 1829.

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P. L. 1877

CHAPTER LVI

A Supplement to an act entitled "An act to incorporate trustees of religious societies," approved April ninth, eighteen hundred and seventy-five.

Section to be amended recited.

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* That the thirty-first section of the act to which this is a supplement, which reads as follows: The rector, wardens and vestrymen, appointed as aforesaid, shall be a body corporate and politic, in law and in fact, to have continuance forever under the same restrictions and with the same rights, powers and privileges as are granted to and imposed on trustees in and by the first eight sections and the twelfth section of this act; *provided, nevertheless,* if at any time the church be without a minister or rector, the same rights and privileges shall be vested in the wardens and vestrymen; which section refers to and adopts the third section and the eighth section of said act, which read as follows:

"3. The said trustees and their successors shall by such name of incorporation, be able and capable to acquire, purchase, receive, have and hold any lands, tenements, hereditaments, legacies, donations, moneys, goods and chattels in trust for the use of said society or congregation, to an amount in value not exceeding two thousand dollars a year,

and the same or any part thereof to sell, grant, assign, demise, alien and dispose of, to sue or be sued, implead or be impleaded, in any court of law or equity, to make and use a common seal, and the same to alter and renew at their pleasure."

Recital continued.

"8. It shall be lawful for any religious society in this State, however incorporated, to purchase and hold and also to convey and dispose of any real estate, which they may deem necessary and expedient: *provided,* that the same shall not be used by the religious corporation acquiring the same for any other purpose than the rendering and maintaining in any building now or hereafter erected upon such real estate, the worship of Almighty God, and the furtherance of religion according to the tenets and forms of worship of the religious denomination to which such religious society belongs, or for education, or the administration of charity to the bodies or souls of men; any conveyance or agreement by and between any religious corporations, intended for the purposes aforesaid by or under the authority of such corporations, now made or hereafter to be made, is hereby declared to be valid and effectual in law; the proceedings, orders and acts of a majority of all the members of the said corporation, but not of a less number, shall be valid and effectual in law,"

Amendment.

be amended so that the same shall be read as follows: The rector, wardens and vestrymen, ap-

pointed as aforesaid, shall be a body corporate and politic, in law and in fact, to have continuance forever under the same restrictions, and with the same rights, powers and privileges as are granted to and imposed on trustees in and by the first eight sections and the twelfth section of this act; *provided, nevertheless,* if at any time the church be without a minister or rector, the same rights and privileges shall be vested in the wardens and vestrymen; *and provided further,* that it shall not be lawful for the rector, wardens and vestrymen of any Protestant Episcopal Church, or in case the church be without a minister or rector, then for the said the wardens and vestrymen or for the wardens and vestrymen for the time being of any Protestant Episcopal Church who are trustees of the same, to alien, grant, assign, demise, let or mortgage any real church property without the previous written consent of the bishop and of a majority of the standing committee of the diocese within which such real church property may be situated, or in case of a vacancy in the office of bishop or of his absence from said diocese then of a majority of the standing committee thereof; which consent shall be acknowledged or proved and recorded with the deed, lease, mortgage or instrument of conveyance and without such consent the alienation, grant, assignment, demise, lease or mortgage shall be void.

2. *And be it enacted,* That this act shall take effect immediately.

Approved March 8, 1877.

Appendix A

Paterson's Laws of New Jersey

A. D. 1799.

An ACT *to incorporate trustees of religious societies.*

Passed the 13th of June, 1799.

Religious societies may elect trustees, who shall be a body politic and corporate.

I. BE IT ENACTED *by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That every religious society or congregation of Christians, entitled to protection in the free exercise of their religion, by the constitution and laws of this State, are hereby authorized to assemble at their usual place of meeting for public worship, at any time by them to be agreed upon, giving at least ten days notice of the time and purpose of assembling, by an advertisement set up in open view at or near such place of meeting, and, when so assembled, may, by plurality of voices of such of the said society or congregation as are present, elect any number not exceeding seven, of the said society or congregation, to be trustees of the same; which said trustees and their successors in office are hereby constituted a body politic and corporate in law, by whatever name they shall assume, agreeably to the directions of this act.

Name of corporation to be certified and recorded.

II. AND BE IT ENACTED, That the said trustees, when they take upon themselves a name, shall cer-

tify such name under their hands and seals, and transmit such certificate to the clerk of the court of common pleas of the county, whose duty it shall be instantly to record the same, for which he shall be entitled to receive one dollar; and thereupon the said trustees shall be known and distinguished in law by the name of incorporation so taken, certified and recorded.

Powers and privileges granted to the trustees.

III. And be it enacted, That the said trustees and their successors shall, by such name of incorporation, be able and capable to acquire, purchase, receive, have and hold any lands, tenements, hereditaments, legacies, donations, monies, goods and chattels, in trust for the use of the said society or congregation, to an amount in value not exceeding two thousand dollars a year, and the same or any part thereof to sell, grant, assign, demise, alien and dispose of; sue or be sued, implead or be impleaded, in any court of law or equity; to make and use a common seal, and the same to alter and renew at their pleasure.

Line of succession how to be perpetuated.

IV. And be it enacted, That for perpetuating a line of succession in the trustees of every religious society or congregation, it shall and may be lawful for the members of the said society or congregation to assemble at any time they may think proper, giving notice thereof as herein before is directed, for

the election of the first trustees, or for the election of any other trustee or trustees, in the stead of those or any of those before elected, in case they see cause for the removal of any of the said trustees, provided such removal shall not be in less than one year after his or their election into office; and also to fill up the vacancy, which may be occasioned by the death or resignation of any trustee, or his moving out of the limits of the said society or congregation.

Trustees to take certain oaths.

V. And be it enacted, That every such trustee shall, before he enters upon the duties of his office, take and subscribe, before a justice of the peace of the county, in which he resides, the oath to support the constitution of the United States, the oath of allegiance prescribed by law, and an oath for the faithful execution of the trust reposed in him, according to the best of his abilities and understanding.

The corporation may elect a president; his powers, and duties.

VI. And be it enacted, That such corporation may elect, annually, or oftner, if necessary or expedient, one of their own members to be their president, who shall keep the minutes, and enter the orders, acts and proceedings of the corporation, in a book to be kept for that purpose; who shall have the custody of the common seal, and the papers,

deeds, writings, documents and books of or relating to the said corporation; and who is hereby empowered to convene the said corporation, as occasion may require; and in case of his absence, sickness, death, resignation, refusal to act, or moving out of the limits of the said religious society or congregation, then the said office of president shall devolve on the senior trustee, for the time being, who shall occupy the same until the return or recovery of the president, or the election of another.

A. D. 1799.

Members of the society, to have access to the papers and books of the corporation.

VII. And be it enacted, That upon application to the president, any member of the said religious society or congregation shall have free access to all the papers, deeds, writings, minutes, documents and books of or belonging to the said corporation.

On the death or removal of the president, papers and books to be delivered to his successor.

VIII. And be it enacted, That upon the death, resignation, removal, or expiration of the office of president, or election of a new one, the common seal, and all the minutes, papers, deeds, writings, documents and books of or belonging to such corporation, shall be delivered to the successor in office, on the oath of the preceding president, or in case of his death, on the oath of his executors or administra-

tors, under such pecuniary penalty, as the said corporation shall have previously fixed and ordained, to be recovered, with costs, by action of debt, in the name and for the use of the said corporation.

Acts of a majority of all the trustees to be valid.

IX. And be it enacted, That the proceedings, orders and acts of a majority of all the members of the said corporation, but not of a less number, shall be valid and effectual in law.

The preceding sections of this act not to extend to societies of less than thirty families.

X. Provided always, *And be it enacted,* That the preceding sections of this act shall comprehend or extend to no religious society or congregation, but such as do or shall consist of at least thirty families, who support the gospel, and statedly assemble at one place of public worship: Provided also, That nothing herein before contained shall be construed to extend to or effect the reformed Dutch churches in this State.

Right of property under charter granted by the British government confirmed.

XI. Whereas some religious societies have held property under charters of incorporation, granted by the government of Great Britain, previous to the revolution, and doubts may arise whether such estate, so held, will descend and vest in the corporation created under the laws of this State; Therefore, *Be it*

enacted, That all the estate, real and personal, held in fee or otherwise, in consequence of any charter granted as aforesaid, shall be vested in and held by the corporation, that may have been created in the place thereof, in consequence of the act passed the sixth day of March, in the year of our Lord, seventeen hundred and eighty six, or the supplement thereto, passed the twenty fifth day of November, in the year, seventeen hundred and eighty nine, although no transfer of such property shall have been made, by the trustees incorporated by such charter, to the trustees of the corporation created under said laws, any thing in such charter or in any law to the contrary notwithstanding.

Ministers, elders and deacons of the reformed Dutch congregations to be trustees and a body politic.

XII. WHEREAS it is represented, that according to the constitution, usages and customs of the reformed Dutch churches, the ministers, elders and deacons thereof, for the time being, have the management of the temporalities of the said churches; that several charters have been heretofore granted to incorporate such ministers, elders and deacons for the purposes aforesaid; that some of the said churches have been incorporated together by charter, holding lands and tenements in common, which have since separated and divided by common consent and now desire to hold each its share or part in severalty; and that the said churches cannot avail themselves of the preceding sections of this act, because, they prescribe a mode of electing trustees, repugnant to the constitution,

usages and customs of the said churches; and whereas the legislature is willing to grant relief in the premises, and to communicate equal privileges to every denomination of Christians; *Be it therefore enacted,* That the minister or ministers, elders and deacons, for the time being, or if there be no minister or ministers, the elders and deacons, for the time being, of every reformed Dutch congregation, shall be trustees of the same, and a body politic and corporate in law, by such name as the said trustees shall assume, in manner herein after directed.

Name of such corporation to be certified and recorded.

XIII. And be it enacted, That the said trustees, when they take upon themselves a name, shall certify such name under their hands and seals, and transmit such certificate to the clerk of the court of common pleas of the county, whose duty it shall be instantly to record the same, for which he shall be entitled to receive one dollar; and thereupon the said trustees shall be known and distinguished in law by the name of incorporation so taken, certified and recorded.

A. D. 1799.

Powers and privileges granted to the said trustees.

XIV. And be it enacted, That the said trustees of such reformed Dutch congregation shall, by such name, be able and capable to acquire, purchase re-

ceive, have and hold any lands, tenements, hereditaments, legacies, donations, monies, goods and chattels, in trust for the use of the said congregation, to any amount in value not exceeding two thousand dollars a year, and the same or any part thereof to sell, grant, assign, demise, alien or dispose of; to sue or be sued, implead or be impleaded, in any court of law or equity; to make and use a common seal, and the same to alter and renew at their pleasure. But no deed or instrument of conveyance for any lands, tenements, hereditaments or real estate, shall be good and effectual in law, unless it be sealed with the common seal, and signed by a majority of the members of said corporation.

The reformed Dutch churches may renounce or forego their former charters, and avail themselves of this act.

XV. And whereas some of the said reformed Dutch congregations, which have heretofore been incorporated by charter or otherwise, may see cause to renounce or forego such instrument or act of incorporation, and avail themselves of this law; *Be it therefore enacted,* That it shall be lawful for the trustees of any reformed Dutch congregation, by whatever name incorporated to renounce or forego such charter or act of incorporation and name, by writing under their hands and seals, and recorded as aforesaid; upon condition, that the minister, elders and deacons, or elders and deacons, as the case may require, of such congregation, shall incorporate them-

selves pursuant to the directions of this act; and that upon such incorporation and recording of the said writing, their former incorporation and body politic shall cease and be dissolved, and all the estate, real and personal, held by virtue of the same, shall pass to and be vested in the body politic and corporate formed agreeably to this act, who shall be deemed to be the legal successors in office to the former body politic and corporate, and liable to their debts.

When and how the property of two or more of the said congregations, united in one corporation, shall be divided when such corporation is dissolved.

XVI. And be it enacted, That where two or more of the said reformed Dutch congregations, which have been united in one body politic, shall be disunited by renouncing or foregoing their former incorporation, and shall, each or any of them, become incorporated under this act, then such lands, tenements, hereditaments, monies, goods and chattels, as of right belong to each of the said congregations, separately considered, shall be and remain in the peaceable and quiet possession of the body politic and corporate of that particular church, to which such real and personal estate doth of right belong; and all real and personal property acquired by such congregations, during their union as a body politic, shall be divided between such congregations, in such manner as shall be agreed upon by the trustees of the said corporation.

Appendix A

Two or more of the said reformed Dutch congregations may renounce their former charters, and be constituted into one body politic.

XVII. And be it enacted, That if the trustees of any two or more of the said reformed Dutch concongregations, by whatever name known and distinguished in their respective charters or acts of incorporation, shall see cause to renounce or forego their separate corporations, and be formed into one joint corporation and body politic, it shall and may be lawful for such trustees, by mutual consent, to renounce or foregoing their separate charters or acts of incorporation, by writing under their hands and seals, which shall signify also their intention to become one joint corporation and body politic, and shall be recorded as aforesaid; upon condition, that the said trustees shall form themselves into one corporation agreeably to the directions of this act; and that upon recording the said writing, and after such joint incorporation under this act, their former separate corporations and bodies politic shall cease and be dissolved, and all the estate, real and personal, held by them separately, shall pass to and be vested in the trustees of such joint corporation and body politic, who shall be deemed to be the legal successors in office of the former separate bodies politic, and liable to their debts.

Line of succession how to be perpetuated.

XVIII. And be it enacted, That, for perpetuating a line of succession in the trustees of every reformed

Dutch congregation, the minister or ministers, elders and deacons of such congregation, as shall take and record a name as aforesaid, shall be the first trustees of the same, and shall continue in office until others shall be duly elected, appointed or called, according to the manner, usages and customs of the reformed Dutch church; and every minister, elder or deacon, so constituted a trustee, shall continue in office until another person shall, in like manner, be elected, appointed or called in his stead, and so on as often as occasion may require; and if any dispute shall arise respecting the validity of the election, appointment, or call of the said trustees, the same shall be referred, for final decision, to the superior church judicature, to which such congregation is subordinate, according to the customs and constitution of the said reformed Dutch church.

A. D. 1799.

Oaths to be taken by the said trustees.

XIX. And be it enacted, That every trustee shall, before he enters upon the duties of his office, take and subscribe before a justice of the peace of the county in which he resides, the oath to support the constitution of the United States, the oath of allegiance prescribed by law, and an oath for the faithful execution of the trust reposed in him, according to the best of his abilities and understanding.

Appendix A

What person shall be president of the corporation; his powers and duties.

XX. And be it enacted, That the person, who is, according to the usage and custom of the reformed Dutch church, ordinarily to preside at the meeting of the minister, elders and deacons of the said congregation, shall be president of the said corporation; who is hereby empowered to convene the said corporation as occasion may require, and, at the request of any two or more of the members, it is hereby made his duty to convene the same, in such manner, and under such regulations, as the said corporation shall from time to time direct.

What person shall keep the books and papers of the corporation.

XXI. And be it enacted, That the said corporation may, from time to time, appoint some fit person belonging to the said congregation, who shall have the custody of the common seal, and the papers, deeds, writings, documents and books of or relating to the said corporation, who shall keep the minutes and enter the orders, acts and proceedings of the corporation, in a book to be kept for the purpose, and who shall deliver the said seal, minutes, papers, deeds, writings, documents and books, when demanded, to the said corporation, under such pecuniary penalty as they shall have previously fixed and ordained.

Appendix A

What persons shall have free access to the said books and papers.

XXII. And be it enacted, That every person of the said congregation, who regularly contributes to the support of the gospel in the said congregation, shall have free access to all the papers, deeds, writings, minutes, documents and books of or belong to the said corporation.

Acts of a majority of all the trustees to be valid.

XXIII. And be it enacted, That the proceedings, orders and acts of a majority of all the members of the said corporation, but not of a less number, shall be valid and effectual in law.

When a member shall not be allowed to vote.

XXIV. And be it enacted, That no member of the said corporation shall be allowed to vote in any matter or thing, which immediately affects himself, his private interest or emolument.

To what amount antecedent religious corporations may hold property.

XXV And be it enacted, That it shall be lawful for every religious corporation, which has been creacted by act of the legislature, or by letters patent, to acquire, purchase, receive, have and hold any lands, tenements, hereditaments, legacies, donations, monies, goods and chattels, of the yearly value of two

thousand dollars, although such act or letters patent contain a restrictive clause, limiting the annual revenue and income of the said corporation to a less sum.

Former acts repealed.

XXVI. And be it enacted, That the act, entitled, "An Act to incorporate certain persons as trustees in every religious society or congregation in this State for transacting the temporal concerns thereof," passed the sixth day of March, in the year of our Lord, one thousand, seven hundred and eighty six, and the supplement thereto, passed the twenty fifth day of November, in the year of our Lord, one thousand, seven hundred and eighty nine, be, and they are hereby repealed. Provided, That such repeal shall not annul, revoke or affect any incorporation formed by virtue of the said statutes or either of them, or any order, act, proceeding, matter or thing done or to be done by such body politic; but that the said body politic shall have the same powers, be in the same state, and continue to act and exercise their corporate functions in the same manner, as if this act had not been made.

An Act

No. 80-887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM F. BURNS AND THE RECTOR, WARDENS AND VESTRYMEN OF ST. MARK'S CHURCH IN ORANGE, NEW JERSEY,

Petitioners,

vs.

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, AND THE RIGHT REVEREND GEORGE E. RATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF ON BEHALF OF PETITIONERS

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Serbian Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 1, 4, 5

Petitioners have taken the liberty of filing this Reply to the Brief for Respondents in Opposition to Petition for a Writ of Certiorari in order to correct certain serious misstatements made by respondents and to clarify the actual issues which are presented by this case.

Point I

Facts Considered by the Lower Courts.

The issue before the trial court and the New Jersey Supreme Court (after it had opted for the "hierarchical deference" rule) was whether the Episcopal Church exercised an "ultimate power of control more or less complete" over the property affairs of the local parish. There never was any dispute that the Episcopal Church has a hierarchical structure. There was a serious dispute as to the scope of the hierarchy's authority, the resolution of which was "for the court's ultimate decision." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 725 (1976) (White, J., concurring).

As stated in the New Jersey Supreme Court dissenting opinion, the Diocese failed to identify "any constitutional provisions or canons that address the right of a local parish to withdraw, what happens to its property when that occurs, or who is authorized to resolve a property dispute when a local body secedes." *Protestant Episcopal Church, Diocese of N.J. v. Graves*, 83 N.J. 572, 590, 417 A.2d 19, 29 (1980).[1] On the other hand, the petitioners introduced testimony showing that the Episcopal Church

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1. The "operative facts" cited by respondents at pages 7 and 8 of their brief do not demonstrate, either individually or collectively, that the "rules of polity" of the general church "had placed the ultimate authority over the use of the church property" in the hierarchy. *Jones v. Wolf*, 443 U.S. 595, 618-19 (1979) (Powell, J., dissenting).

never purported to control the property of its affiliated local churches. In particular, the petitioners presented the former official historiographer of both the national Episcopal Church and the diocese of New Jersey, who specifically testified that when St. Mark's reincorporated in 1832 it was clearly contemplated that parishes could disaffiliate and retain their properties (3T7). This testimony was specifically pointed to by the dissenters below. 83 N.J. at 590, 417 A.2d at 29.

It was to rebut this testimony and to present the court with a basis for finding hierarchical control over parish property, that the respondents introduced their own expert testimony. The respondents' expert conceded the absence of express trusts of parish property in favor of the hierarchy, but argued that hierarchical control could be deduced from weaving together various canons and from the interpretations of prayers and rituals.

After quoting extensively from their expert's testimony in both their post-trial brief and in their brief to the Supreme Court of New Jersey, respondents now argue that the New Jersey courts never considered these 134 pages of testimony. Respondents cite no authority for this assertion, nor do they suggest how, in the absence of considering such testimony, hierarchical control over parish property was found to exist by the courts below. Respondents never explain how the majority below could have decided the disputed issues of church law set forth at pages 15 and 16 of the Petition in this case without considering such testimony. Respondents do point to the canon adopted by the General Convention of the Episcopal Church in September of 1979 which created an express trust in favor of the general church. But that canon was enacted *after* the disaffiliation and *after* the trial in this matter.

Contrary to respondents' assertions, the opinions of the trial court and the Supreme Court of New Jersey explicitly show that both courts considered *all* the testimony and evidence offered by respondents at trial. The trial judge concluded that the Episcopal Church was hierarchical for property purposes "[b]ased on the documentary evidence and the testimony. . . ." *Petition for Cert.*, App. B at 13a. Similarly, the New Jersey Supreme Court majority stated that "it has been established that the Protestant Episcopal Church is a completely integrated hierarchical body, the ecclesiastical determination of which incidentally resolves the question of control over local church property." 83 N.J. at 580, 417 A.2d at 24.

Respondents' own brief in opposition to the pending Petition for Certiorari itself ultimately relies upon the *interpretation* of a canon to demonstrate property control. Respondents cite the canon which gives the parish rector the right to the "use and control of the church and parish buildings." Resp. Br. at 11. The rest of the canon, conveniently omitted from respondents' brief, states that the use of such property by the rector is only "for the purposes of his office," *i.e.*, the *spiritual* jurisdiction described in an earlier portion of the canon. The testimony at the trial was in conflict as to just what the canon actually means, particularly in light of another canon which leaves the *property* affairs of a parish to its elected vestry. It was just this type of conflict in testimony as to the meaning of the canons that the dissenters below pointed to in arguing that the inquiry into church doctrine engaged in by the majority in resolving the dispute constituted an "establishment of religion with a vengeance." 83 N.J. at 590, 417 A.2d at 29.

Point II

The Deposing of the Parish Rector.

Respondents point to the fact that petitioner Burns was deposed as parish rector and argue that on the basis of *Serbian Orthodox Diocese v. Milivojevich,* this action is dispositive of the suit. Reliance on *Serbian* is completely misplaced. In that case the issue was the propriety of the defrocking of a bishop in the context of that bishop's seeking to *retain* his office. In the instant case, the parish rector voluntarily disaffiliated from the Episcopal Church and is in no way arguing that he retains his Episcopal Church office. In *Serbian,* it was clear that the occupant of the post of bishop controlled the property. One of the issues in this case is whether the existence of hierarchical power to depose the parish rector from his ecclesiastical office implies the existence of an ultimate power of control more or less complete over the property of the parish. As shown by the conflicting evidence in this case and as argued by the dissenters below, the answer to that question requires the courts to make "a searching and therefore impermissible inquiry into church polity." *Jones v. Wolf,* 443 U.S. at 605.

Point III

Timeliness of the Issue.

Respondents argue that a clarification by this Court of the extent of inquiry into church polity that is permissible for the settlement of church property disputes would somehow "engender uncertainty" and "create chaos." Resp. Br. at 14-15. The simple statement of respondents' argument demonstrates its absurdity.

During a ten-year period commencing in 1969, this Court decided four cases in the church property area, and in so doing set down much-needed constitutional guidance for the resolution of such disputes. *Jones v. Wolf, supra; Serbian Orthodox Diocese v. Milivojevich, supra; Maryland & Virginia Churches of God v. Church of God at Sharpsburg,* 396 U.S. 367 (1970); *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church,* 393 U.S. 440 (1969). Having already devoted so much time to this particular area, it would be a disservice to those lower courts applying the hierarchical deference rule if this Court were not to finish the job by providing the guidelines to be followed by such courts in determining whether or not a general church is hierarchical. The instant case, with its fully-developed record, provides the Court with the appropriate context for the consideration of the appropriate guidelines and limitations.

CONCLUSION

For all of the foregoing reasons and the reasons stated in the Petition for a Writ of Certiorari, this Court should issue a writ of certiorari to review and reverse the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

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